Supreme Court, U.S.
FILED
00-225 JUN 12 2000
OFFICE OF THE CLERK

No: _____

IN THE
SUPREME COURT OF THE UNITED STATES

Timothy L. Mack
Petitioner,
v.

State Farm Insurance Companies
Respondent,

(a.k.a.: State Farm Mutual Automobile Insurance Co., and State Farm Group).

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Timothy L. Mack
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92 pp

QUESTIONS PRESENTED:

1)...Whether the Lower Courts duly considered the necessary facts for shifting the burden of proof upon the Plaintiff ...and whether proper consideration was given toward the Plaintiff's true disability – MENTAL in nature?

Background... Judge Michael Mihm, of the U.S. District Court did not properly apply the burden of proof shifting framework. He improperly applied said burden on the non-moving party, the Plaintiff, instead of on the moving party, the Defendant, as should have happened.

2)...Whether the Objections made by the Plaintiff's Attorney of record at the time of Summary Judgment, Maurice J. Barry, to the Defendant's Statement of Uncontested Facts were properly ruled upon by the District Court. My Attorney raised several objections to the "Facts" submitted by the Defense, in support of their Motion for Summary Judgment. Did Judge Mihm make a good and correct decision by not ruling on said objections before declaring Plaintiff's response to these statements as answered in the affirmative? There were objections on record by proper and timely Motion on the part of the Plaintiff – was it correct and proper for Judge Mihm to not allow the "Facts" to be answered by the Plaintiff?

Background... Judge Mihm overruled the Plaintiff's extraneous, yet necessary Motion/Objections to several portions of Defendant's Uncontested Facts.[1] Instead of proper allowance given by Judge Mihm to the Plaintiff for affirmation or denial, after ruling upon the objections, Mihm wrongfully declared all Defendant "so-called Facts" as true!

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[1] Judge Mihm gave several opportunities for the Defendant to modify their replies and add extraneous Responses to my "Pro se" Objections. This was disparate treatment between the parties involved!

3)...Whether the Lower Courts gave due consideration to the now "Pro Se" Plaintiff's timely, date stamped, and properly submitted Amended Responses and Objections to the "Defendant's Statement of Uncontested Facts" in support of their Motion for Summary Judgment?

Background... Acting "Pro Se", after my Lawyer's untimely quitting, I submitted a timely Motion to Reconsider with the aforementioned Response. These documents were not given proper consideration by the Lower Courts.[2] The only reply to the Defendant's "Uncontested Facts" considered was that of my ex-Lawyer. Yet, I went on record with corrections, within the time allowed by the Court.

4)...Whether the Courts duly considered the Plaintiff's complaints of Irregularities and Improprieties?

Background... These proceedings contain many misleading statements, lies, perjury, and stolen evidence on the part of the Defendant, and Mr. Roesler. These pertained to germane issues of these proceedings! Judge Mihm treated my Motion to come forward with evidence of said improprieties with great indifference. This greatly surprised and disconcerted your Petitioner — in search for JUSTICE!

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[2] I was misinformed by a Deputy Clerk of the District Court. I was told that all Motions were to be submitted by the 30-day deadline provided after the Final Order. By the Clerk's saying all Motions were due within 30 days, I was misled to believe that both my Motion to Reconsider, and my Notice of Appeal, if necessary – had to be submitted within said time period. I specifically asked if I would be given another 30 days to file a Notice of Appeal, if my Motion to Reconsider was denied. The Clerk said, "NO"! Therefore, I was forced to submit my Motion to Reconsider and my Plaintiff's Amended Response to the Defendant's Uncontested Facts on May 13, 1999. Unfortunately, I acted according to the misinformation by The Court, and had to submit my Plaintiff's Notice of Appeal the next day, which was the 30th day, and the deadline. (***NOTE:*** My ex-Lawyer unnecessarily delayed the release of documents, which in turn delayed my "Pro Se" Motion to Reconsider.)

5)...Whether the Supreme Court should consider adding verbiage to the existing Title 42 U.S.C. § 12203 (a)(b), regarding Retaliation, Coercion, Interference, and Intimidation. Proposed additional legal clarification would prohibit any further exacerbation, on the part of the Defendant, of the Complainant's condition to a point that technically moves said Complainant from a "protected" to a "non-protected" ADA guideline status, during proceedings?

Background... When I first leveled my Complaint(s) with the EEOC, and subsequently filed my original Lawsuit against the Defendant State Farm, I was an "able-bodied" and "able-MINDED" employee, and proved this Material FACT by working during these most trying times and circumstances. Thereby, allowing me inclusion within the "protected" group by my fulfillment of all four requisites.

After the Defendant came to realize I had charged them with violations of both my ADEA and ADA Civil Rights, they set a course of action against me comprised of adverse treatment. I continually received this adverse treatment at the hands of the Defendant, causing me a "life-threatening" atmosphere in which to work. In short, due to my Heart Condition (caused in part by foul treatment) and my Mental Disability of OCD (Obsessive/Compulsive Disorder) State Farm found it somewhat easy to create a "hostile environment" in which I could not thrive or survive!

Consequently, the Appellate Court concluded that I was not a "Qualified Individual" with a Disability, because (by their unilateral, wrongful Judgment) I could no longer perform my duties in this new, "life threatening", "hostilely charged environment" of which they were aware, and so named and noted. [***NOTE:*** Judgment was contrary to *Anderson v. Liberty Lobby, Inc.* – further discussed herein.]

PARTIES TO THE PROCEEDING

Petitioner

Timothy L. Mack, is an individual with no corporate ties.

Respondents

State Farm Insurance Companies, (a.k.a.... State Farm Mutual Automobile Insurance Company, as Mother Company, and State Farm Group, which is the name of the Corporation, with Headquarters based in Bloomington Illinois.

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The Petition should be granted because…

I. …The Seventh Circuit's decision conflicts with the burden shifting of proof framework as determined by Federal Rule 56 20

II. …The U.S. District Court for Illinois did not allow the Plaintiff ample opportunity to properly respond to the Defendant's Motion for Summary Judgment, specifically, the 101 so-called "facts" presented within the Defendant's Statement of Uncontested Facts. The District Court misapplied Local Rules to arrive at this faulty decision. 25

III. **...The Seventh Circuit disallowed an Amended Response to the Defendant's Statement of Uncontested Facts from the, now "Pro Se", Plaintiff, which, contrary to the Seventh Circuit's Opinion – was filed in a timely manner. 25**

IV. **-...The U.S. District Court for Illinois blatantly disregarded the Plaintiff's cry to the Court begging consideration of the Defendant's improper, and allegedly illegal, actions in the form of misleading statements, lies, perjury, and theft and destruction of evidence. 29**

V. **... The Supreme Court should take under serious consideration an addendum to the Law, Title 42 U.S.C. § 12203(a)(b) that makes a necessary allowance for an employee, who is deemed "able" to work at the onset/initiation of any proceedings, to continue with her/his Complaint(s) as a member of a "protected" group, in spite of the fact or possibility that s/he may no longer be able to perform her/his job, through no fault of her/his own. Thereby granting my Petition to further consideration of the addition to this Law! 29**

CONCLUSION.....30

APPENDIX – A – United States Court of Appeals for the Seventh Circuit – ORDER – Mack v. State Farm 1-A

APPENDIX – B - United States District Court, Central District of Illinois – Mack v. State Farm.....12-A

APPENDIX – C - United States Court of Appeals for the Seventh Circuit – FINAL ORDER/Denial of Motion to Reconsider – Mack v. State Farm 38-A

APPENDIX – D – EEOC NOTICE, Number 915.002, Date 3-25-97 – Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities 39-A

APPENDIX – E – Letter from Deb Dresslar, Director of State Farm Human Resources, denying my Request for Reasonable Accommodation 52-A

TABLE OF AUTHORITIES

Cases

Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Foster v. Arthur Anderson, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999)

Cain v. Lane, 857 F.2d 1139, 1142 7th Cir. 1988).

United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) .....

Rules and Statutes

Title 42 U.S.C. § 12101 et seq.

Title 29 U.S.C. § 623 et seq.

Federal Rule of Civil Procedure 56

Note to the Court:

Due to your Court's instructions for reprinting my Petition for Writ of Certiorari and adding the District Court's Order, I was left with no other choice but to edit my original submission.

In submitting the original, I was aware only of the minimum margin rule of 3/4 inch. I was unaware of your maximum width and depth of copy rule, and my Writ was approximately an 1/8 inch too wide. I was also unaware that the District Court Order had to be submitted, since only the Appellate Order was directly solicited. Therefore, I had to reconfigure and edit my document to your specifications, since the new, narrower specs added three to four pages.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Timothy L. Mack, respectfully requests that a Writ of Certiorari be issued to review the judgment in opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS

The opinion in the United States Court of Appeals for the Seventh Circuit of Mack v. State Farm is unreported. The Court of Appeal's denial of Timothy L. Mack's Appeal is a decision without a published opinion and can be found in Appendix – A herein.

JURISDICTION

On April 15, 1999, the United States District Court for the Central District of Illinois denied plaintiff, Timothy L. Mack, the right to proceed in the District Court by affirming the Summary Judgment sought by the Defendant State Farm. (Appendix – B)

On March 14, 2000, the United States Court of Appeals for the Seventh Circuit reaffirmed the District Court's decision, by denying the Appellant, Timothy L. Mack's, timely-filed Motion to Reconsider. (Appendix – C)

Pursuant to United States Supreme Court Rule 13.1, this Petition for Writ of Certiorari has been filed within the 90-day deadline after the Seventh Circuit DENIED the "Pro Se" Plaintiff/Appellant's Petition for Rehearing.

Thereby, this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)

STATUTES INVOLVED IN THIS CASE

The original cause of action was brought pursuant to the law of the United States, specifically Titles 42 U.S.C. § 12101 et. seq., 29 U.S.C. § 623 et. seq., also Civil Rights Act of 1964, Civil Rights Act of 1991, as well as the Fourth, Eleventh, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Introduction

I, the Petitioner, Timothy L. Mack went to work for State Farm Insurance Companies on April 1 1977. My position was that of Art and Design Supervisor, in State Farm's Audio-Visual Department. I held my Supervisory position with A/V (Audio-Visual) for a period of 18 years. During my tenure in this department, I experienced no progress with my career – no promotion.

Several times during my years in A/V, I expressed to Management my concern and wishes of receiving a promotion. My queries regarding a promotion were met with many types of rejections, which deepened my frustrations and despair. In order to show Management the depth of my frustrations, I asked if it were possible to be transferred to Public Affairs. To which the answer from our Department Head in A/V, was "NO"!

Approximately three years later, during a period of Departmental Reorganization, A/V Management told me that I was finally going to get my wish. They told me that I was being transferred to Public Affairs, effective August 5 1995. I was informed that I could return to Audio-Visual if things did not work out for me in Public Affairs.

During my first year in Public Affairs, I was informed that I was transferred to their department on a trial basis. This was not my understanding as I left A/V, but communiqués with both departments confirmed their mutual agreement. Therefore, a Reasonable Accommodation of a transfer back to A/V was not a hardship to the Corporation.

During this year in Public Affairs, I made several inquiries to Management about my career path. I was told that I was starting at "square one" and my first 18 years with State Farm counted for absolutely nothing. My frustration and despair, on record with State Farm's CEO and Human Resources, became even deeper with this new and most disconcerting proclamation.

On July 11, 1996, I met with Mike Livingston, my Department Head in Public Affairs. During said meeting I made a direct inquiry as to whether I could be considered for the unit's Supervisory position vacated by Barry Lowe, or any other promotion. Mr. Livingston told me, very clearly, that I would not be considered for this, or any other promotion due to my MENTAL Capacity. Mike said I exhibited the following characteristics:

- You see things through sunglasses, and not as they really are...
- You carry around excess baggage...
- Things keep going round-and-round in your mind...
- You fail to let go of the past...
- If I say 'ABC' today, you'll say 'XYZ', and if I say 'ABC' in two weeks, you'll say '123'...

Livingston also stated, "there is someone in A/V with whom [I] couldn't get along." This was an UNTRUE

statement from my former Management in Audio-Visual.

I answered Mr. Livingston immediately by saying, "You do realize that I have OCD (Obsessive/Compulsive Disorder), don't you?" To which he replied, "I don't know anything about OCD, all I know is..." he then repeated verbatim his list of my supposed MENTAL shortcomings.

Although I informed Mr. Livingston of my Disability, he disregarded said "notice" by repeating the very same incriminating list of my MENTAL traits. I answered Livingston with, "You say that you don't know what OCD is... yet you just gave a textbook definition of it."

B. Factual Background

I considered Mr. Livingston's reasons for not considering me for a promotion as a direct violation of my ADA Civil Rights, regardless of statements by the Defendant or the Opinions of the Courts. The Defendant pleaded that no violation had been committed against me since a more qualified individual had been picked for the job in question. The Courts agreed. Although, I believe I could show the Defendant's plea to be pretext, if I ever get to argue the issue in Court, the point should have been considered moot.

The most important issue escaped the Courts as they cited precedents involving the requisite that a similarly situated individual without a disability was promoted above me. When, in actuality, they should have considered the requisite, which simply states that, I, the disabled person suffered adverse treatment by Management due to my disability. The actual violation to the my ADA Civil Rights occurred during my meeting of July 11, 1996, with Mr. Livingston when he unequivocally denied me consideration for any promotion, strictly on the basis of my MENTAL Disability. Contrary to both Courts' stating that I, as

Plaintiff and non-moving party, never presented any Material Issue of Fact regarding the Defendant's violations against my ADA Civil Rights, I did so. I cited Management's (Livingston's) listings of my so-called negative MENTAL symptoms on several occasions! And, I proffered considerable information regarding my OCD, as did my opponent, the Defendant State Farm, and their "expert witness" Dr. Richard Ratner, Psychiatrist. I considered these Material Issue of Facts! Furthermore, I also proffered evidence as to the ADA's protection of my OCD, as a Qualifying Disability. Even the Appellate Court conceded knowledge of the fact that OCD is a Qualifying Disability by stating the following (Appendix – A),

"Fifty-one year old Timothy Mack has suffered from Obsessive-Compulsive Disorder (OCD) since the *fifth* grade. The Equal Employment Opportunity Commission (EEOC) recognizes OCD as a psychiatric disability under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12111."

I contend that the Lower Courts missed an integral part of the Laws concerning Title 42, regarding ADA violations. This could have been due to the fact that Managers of Corporations do not usually come straight out with an admission of their true bigoted beliefs regarding "Disabled" Personnel, as the Defendant did. Mr. Livingston stated unlawful reasons, based solely on my MENTAL symptoms, in denying me consideration for any promotion.

For the above reasons, and the ensuing "lockouts" from work that I suffered at the hands of State Farm, I thereby consider my Original Complaint a "Prima Facie" Case against the Defendant State Farm. The violations against my ADA Civil Rights consisted of:

The adverse action of outright denial by Management

of my "career path" due to my Mental Disability (OCD)...

Retaliation and Interference for my filing of charges with the EEOC and the District Court, violated 42 U.S.C. § 12203(a)(b)... The Defendant leveled unwarranted threats of Retaliatory Termination at me. One of the two threats I received expressly stated my helping a fellow-employee with her ADA Violation Complaint as reason for Termination. In addition, said "lockouts" from work were not only Retaliatory, they gave the Defendant freedom to destroy evidentiary files on my computer, and in my Daily Planner. Dr. Zehr, Manager of the Medical Department admitted, during Deposition, that my "lockouts" from work were extraordinary and uncommon actions taken against me during my Sick Leave. If memory serves me correctly, he said that "lockouts", during Sick Leave, never occurred!

State Farm's theft and destruction of much of my Daily Planner and Computer Files, to be used in evidence, was brought to the Courts' attention. Yet, the Lower Courts did not consider this as Material Fact. Even more surprisingly, the Courts were unconcerned by the tampering of evidentiary materials, which occurred after matters were filed, and the Defendant was notified of litigation.

Another, and equally damaging procedural mistake was made by the Courts when they improperly allowed the burden of proof to be shifted from the Defendant, the "moving party", back to the Plaintiff, the "non-moving party"! This was done by the Courts while considering only facts concerning my physical ability – without regard to ANY of my MENTAL traits, characteristics, or symptoms!

My Attorney, Maurice J. Barry, attempted to remind the District Court that the judgments of all points of issue should be considered only in the "light, most favorable to the

non-moving party." This was not the case as Judge Mihm and the Appellate Court took a very limited and wrongful look at the Defendant's Statement of Uncontested Facts when considering only my physical ability, which could not have possibly met their burden for shifting of proof. Either the Courts forgot this was a case of Mental Disability, or they took a very liberal view at the facts proffered by the Defense.

[***NOTE:*** With your Supreme Court's indulgence... And, with your consideration, perusal and realization of all the precedents cited by both Courts (Appendices – A & B) regarding the processes of Summary Judgment, and the Burden of Proof Shifting Framework, I wish to point out several misapplications by the Courts to said processes. I do so without further and redundant quoting of passages contained within said Appendices.]

I contend that the moving party, the Defendant, did not meet their burden, since the Defendant did not proffer any evidence or "Uncontested Facts" that were even closely related to dealing with MENTAL traits or characteristics. Such mental traits as thought, memory, concentration, reasoning, planning, creativity etc., were conspicuously absent and not addressed by the moving party, the Defendant. Therefore, State Farm did not proffer any MENTAL characteristics as being normal, or as non-interfering in the performance of my job. Only by the Defendant's dealing with these mental traits could they show the Plaintiff to have or not have a Mental Disability, as the Court unilaterally so deemed. In short, the Defendant NEVER ADDRESSED ANY MENTAL ATTRIBUTES of your Petitioner, with the exception of the Defendant's expert witness Dr. Richard Ratner, Psychiatrist – who confirmed, by "professional diagnosis" that I indeed did suffer from OCD (item #89, below)! The following are the Defendant's

only "Uncontested Facts" in support of their Motion for Summary Judgment, which were even remotely concerned with showing the Court that I had no "Qualifying Disability":

> 2. Mack attended Rosary Catholic Grade School as a C-average student. He was never held back a grade, had no significant disciplinary problems, and participated in school related basketball, baseball, and football programs [Mack Deposition, Exhibit 1, pages 253 & 254].
>
> 74. In January 1997, Mack and his wife hosted a Super Bowl party [Deb Mack Deposition, Exhibit 7, page 70].
>
> 76. July of 1997, Mack again went on a family vacation to the Cedar Point Amusement Park on Lake Erie in Ohio [Mack Deposition, Exhibit 1, page 170].
>
> 84. In January 1998, Mack and his wife hosted a Super Bowl party [Deb Mack Deposition, Exhibit 7, page 70]
>
> 85. In April of 1998, Mack and his wife took a 10-day European vacation to Spain [Mack Deposition, Exhibit 1, page 169]
>
> 86. On April 29, 1998, Mack filed a Total Disability Claim Form asserting that a return to work "puts me in a life threatening position dealing with the extreme hostile work environment" [Form copied as Exhibit 30].
>
> 89. On June 11 and 12, 1998, Dr. Richard Ratner, a forensic psychiatrist retained by State Farm as an expert in this case, performed a full psychiatric evaluation

of Mack, leading to the production of a report [see Ratner Affidavit, Exhibit 6]. In the opinion of Dr. Ratner, as set forth in his Affidavit and report:

a. Mack does suffer from OCD, along with other psychiatric conditions;

b. Mack's psychiatric conditions do not limit any major life activity, including the activity of working, although Mack's paranoia and obsessionalism have combined to "poison the well" of his employment at State Farm; and

c. State Farm is uniquely a place where Mack will not be able to return to work.

91. While employed in the Public Affairs Department, Mack never displayed any difficulties caring for himself, performing manual tasks, sitting, standing, lifting, walking, seeing, hearing, speaking, or breathing [Rosenstock Affidavit, Exhibit 20].

92. Mack does not have difficulty maintaining his own typical and normal sleeping patterns [Mack Deposition, Exhibit 1, pages 61 and 62].

93. Mack has never been restricted from driving a car [Mack Deposition, Exhibit 1, page 93].

94. Mack rates himself in the top 5% of all State Farm employees in terms of what he contributed to the company through good, valued, hard work [Mack Deposition, Exhibit 1, page 126].

In light of the above items, I offer the following:

"Any doubt as to the existence of a genuine issue for trial is resolved against the moving party." (See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Cain v. Lane, 857 F.2d 1139, 1142 7th Cir. 1988*).

It escapes my logic how Dr. Ratner's comments (in item #89, above) did not show the Courts at least a seedling start of Retaliation, on the part of the Defendant! How can the Courts be so remiss as to overlook something so patently inconsistent, contradictory, and/or RETALIATORY? The Defendant proffered, their "expert witness", Dr. Ratner's statements of how, in his opinion: my...

"...psychiatric conditions do not limit any major life activity, including the activity of working, although Mack's paranoia and obsessionalism have combined to "poison the well" of his employment at State Farm; and... State Farm is uniquely a place where Mack will not be able to return to work."

In short, Ratner rather foolishly stated that I can work – I JUST CANNOT WORK at STATE FARM!

Besides the Defendant's statement being all too convenient, I am totally surprised that the Courts did not take into consideration this statement as possible issue of facts in my behalf, which leaves enough in question precluding the determination by a "reasonable finder (trier) of the facts"! The facts are:

Fact #1... A Plaintiff can, and probably should, have adverse feelings toward the turn-of-events that brought a cause to such extreme ends! **BUT**, there is hardly a logical explanation for the Defendant to harbor similar feelings – and be permitted by the Courts to show them in their actions against said Plaintiff – as is obviously the case here!

Fact #2... The Defendant's own "expert witness" stated that my "...psychiatric conditions **do not** limit any major life activity, including the activity of working"! Yet, in light of this so-called "fact" presented by the Defendant, I was deemed wrongfully by the Courts, contrary to the Defendant and myself, to be "totally & completely disabled"!

[***NOTE:*** Both the District and the Appellate Courts have arrived at misguided conclusions on their own. They wrongfully opined (**JUDGED**) that I am "Completely Disabled" (Appendix – A, p. 5-A, para. 2) and "Totally Disabled" (Appendix – A, p. 10-A, para. 2 & Appendix – B, pp. 33-A, para. 4 & 34-A, para 1). These statements by the Courts should be considered as a wrongful independent stance of the Courts, when seen in the light of admissions of State Farm associates/witnesses (p.12, para.2).

This wrongful independent position taken by the Courts seems to be due to the semantics used by the Defendant's Attorney. Mr. Roesler interjected these terms possibly in an attempt to mislead the Courts. If the terms appeared at all, other than in the "Defendant's Statement of Uncontested Facts", they were probably part of a form I had to fill-out for "Disability" – not, "Total", "Complete", or "Permanent" Disability – but "Long Term Disability"!

Never once did I assert, as the Court so stated, that I am either "TOTALLY DISABLED" or "COMPLETELY DISABLED"! I consider these groundless, absurd and most JUDGEMENTAL things for the Courts to state! The Appellate Court also wrongfully stated the following:

> "Mack's own physician stated that it was 'unknown' when Mack would be able to return to work... It was Mack's burden to show that he was willing and able to come to work on a regular basis in October 1998, *see*

> *Nowak*, 142 F.3d at 1003; he did not do so, and thus he was not otherwise qualified for his position." (Appendix – A, p.10-A, para.2)

Dr. Timothy Roberts, my Psychiatrist, was protecting me from an extremely "life-threatening" and "hostile environment"! This action, by my Doctors, was taken due to the immediate damage my "hostile work environment" was causing. Furthermore, Dr. Roberts had to add that he did not know when I would be able to return, due to State Farm's unequivocal denial of my most necessary "Reasonable Request for Accommodation"!

I do not know how the Appellate Court arrived at the conclusion that I did no follow-up regarding my return to work. They stated that this "so-called" neglect as making me unqualified for my position. This conclusion is not true! With every communication with Human Resources, during the period in question, I took the opportunity to inquire about my return with accommodation! In fact, I have evidence in the form of e-mails to Rich Smith of Human Resources, which demonstrated my said inquiries! Again, the Appellate Court wrongfully and unilaterally concluded that I was not willing or able to return to work! This too, is contrary to the standards for Summary Judgment set in *Anderson v. Liberty Lobby*, quoted in the second paragraph of the following page.

I contend wholeheartedly that these slurs to my professionalism goes against the ruling and standard presented in *Anderson v. Liberty Lobby*, quoted in the next paragraph. [This passage from *Anderson v. Liberty Lobby* comes into play many times regarding the opinions of pertinent issues offered by both Courts. I beg your Supreme Court to consider this note while perusing the Orders of the Courts. In some instances, the Courts have made misguided conjectures, bringing them to wrongful conclusions and

"facts"! I present the passage below, since Judge Mihm overlooked it when he cited *Anderson v. Liberty Lobby, Inc.*]

The U.S. Circuit Court of Appeals overstepped its bounds by making Judgments, upon issues, which were presented by neither the Defendant State Farm nor myself! These Judgments made by the Court directly contradict the findings in, and standards set by, *Anderson v. Liberty Lobby*, which states that... **"At the summary judgment stage, the trial judge's function is *NOT* himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."** The Appellate Court Judges not only weighed the evidence, they communicated issues which were wrongfully stated, and never made as issue by either party! In fact, the Defendant's Motion for Summary Judgment, and accompanying "Uncontested Facts" were indecisive as to whether they should state I was Disabled or not. The Deb Dresslar Letter, from State Farm Human Resources Management (Appendix – E, proffered by the Plaintiff) [3], and the testimony of State Farm's "expert witness" Dr. Ratner attempted to prove I had NO DISABILITY, which prohibited me from working.

In summary, The Defendant, State Farm, by the statements of their Medical Director, Dr. Stephen Kindred, their Human Resources Department, in the person of Deb Dresslar, and by their "expert witness" Dr. Ratner, have gone

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[3] The Dresslar Letter (Appendix – E) undermines the EEOC Notice, which requires consideration of reassignment to a different position as a reasonable accommodation. (The EEOC Notice [Appendix – D, p. 51-A, item #29] affords more latitude toward the "Disabled" than the Courts have allowed. ***NOTE:*** The Defendant was required to state that a reassignment would cause undue hardship to State Farm, but they failed to do so? Instead, State Farm unilaterally, wrongfully and unlawfully decided I had no Disability. Also, I have stated to State Farm my willingness to follow Management's initial plan to return to A/V)

on record as saying that I DO NOT suffer from a mental impairment, which leaves me totally disabled! The Appellate Court (contrary to *Anderson v. Liberty Lobby,* preceding page) has taken it upon themselves to wrongfully judge that I am not included within the "protected" group, by "single-handedly" declaring me as "totally disabled"! Furthermore, the Courts failed to take into consideration my 25 plus years of uninterrupted, fruitful work, including my Military commitment during Viet Nam.

With the exception of (item #89) the somewhat helpful, inadvertent admission by Dr. Ratner, in the Plaintiff's list of Material Issue of Fact, there was nothing proffered by the Defendant, as "moving-party", which broached any Mental characteristics of the Plaintiff. Therefore, the Defendant failed in proving the Plaintiff's lack of any Disability. Thus, they also failed to meet the burden of proof shifting; necessary for the District Court's actual, but misconceived, finding of my Disability status.

[***NOTE:*** In presenting the views of Dr. Ratner, Dr. Kindred, and Ms. Dresslar, I am only stating an agreement, in part, with their proffered positions that I am able to work. This righteous collective statement is diametrically opposed to the opinions of the both Courts. Conversely, I obviously do not subscribe to their notion that I have No Disability! Although, I realize it may seem a bit like wanting to "have my cake and eat it too" – I have used their collective position about my positive ability to work in order to refute the wrongful position of the Courts. In so much as the Courts wrongfully opined – I am not included in the "protected" group, since the Courts declared me to be "totally disabled"!]

Is there a "Prime Facie" Case of Discrimination against my Civil Rights according to the Americans with Disabilities Act?

Obviously, I contend there were violations of my Civil Rights, or I would not have risked a 25-year career! I waited-out my turn to climb the "ladder to success." The wait was at times very frustrating, as the Courts have noted, but I thought I could make it on my own – without litigation. The District Court's Judge Michael Mihm alluded to my lack of action, and at the same time shows his failure to see any positive action on my part concerning the continuing violation doctrine regarding my ADEA Complaint. Judge Mihm stated in his Order:

> "In short, Mack completely fails to explain why the continuing violation doctrine applies to the facts of this case. Mack's argument concerning the statute of limitations tissue is made in a single paragraph in his brief:"

Judge Mihm quotes Plaintiff's Attorney...

> "With regard to Defendant's position on Statute of Limitations, the Plaintiff would assert that this argument falls far short of having any credence, especially due to the fact that the plaintiff was terminated on Oct. 26, 1998. Prior to the date of termination, the Defendant always stood in a position to reassign or accomodate [sic] the Plaintiff, an action they chose not to do."

Judge Mihm continues...

> "This underdeveloped, perfunctory argument falls far short of establishing that the continuing violation doctrine should apply in this case."

The Plaintiff's statement above shows that I was trying to "right the wrongs", and exhaust all internal avenues

prior to the "major jump" into litigation! Judge Mihm's opinion on this issue shows a lack of sensitivity toward my attempts to handle things at the source, as my Lawyer alluded, but Judge Mihm failed to understand.

Many facts, as stated by the Courts, including those above, are misinterpreted, since they came from misleading statements, lies, perjury, and/or destruction of evidence on the part of the Defendant (Question #4, p. ii).

The matter of "continuing violation doctrine" would not have become an issue had it not been for the Defense Counsel's misappropriation of the Plaintiff's personal notes, and Mr. Roesler's unilateral conjecturing, without the benefit of deposition, as to the meaning of said note. In short, Counsel for the Defense made up a little story to fit a small piece of evidence. Specifically, Roesler misled the Courts in his somewhat contrived statement of "fact", that I had a meeting with my Lawyers to discuss legal action against State Farm at the same time I was moved to Public Affairs in August of 1995. To the logical person, especially one who took note of my happiness with said move, the above statement would seem most out of place. Yet, the Defendant wrongfully posed this contrived nonsense in their Defense.

The liberties that the Defendant took with the truth was made known to the District Court by your Petitioner. In my motion dated August 9, 1999, I begged the Court to consider the Defendants improprieties by stating:

> "To the Plaintiff Mack, this is yet another example of many attempts to willful and knowing misrepresentation of the facts on the part of the Defense. In order for JUSTICE to come from these proceedings, and not just create another appeal, the Court must seriously consider those concerns of the

Plaintiff previously stated regarding the irregularities of this case, including, but not limited to, Perjury and Obstruction of Justice. If there is to be made any Judgments worth the consideration of the blindfolded lady holding the scales – the Court's in depth inquiry into these matters is paramount. Anything less than bringing these questions of impropriety into the light of Justice, once aired to the Court as the Plaintiff has time and again, would be most improper. And, as the Plaintiff has stated before, to find in favor of the Defendant with such irregularities left unanswered could be tantamount to monetarily rewarding the Defendant's highly questionable actions and tactics.

MOTION TO HEAR ARGUMENTS IN CHAMBER OF IRREGULARITIES AND ALLEGED IMPROPRIETIES

The Plaintiff is at a decided disadvantage in proceeding "Pro Se"! It is a concern that the Defendant may be taking advantage of Mack's lack of "legal expertise" in these proceedings, and would hope that the Court would help in ferreting tactics that are out-and-out illegal or diametrically opposed to procedure or law. The Court owes "Lady Justice" such consideration, and, on a lesser scale, the Plaintiff Mack. Regardless of all parties' personal feelings, rules of procedure and law will be guided ultimately by the Court. If the Court is not to let the "Pro Se" Plaintiff litigant run amuck, then the Plaintiff trusts the Court to not permit the Defendant any more latitude due to the Plaintiff's ignorance. The Law is The Law, and it goes

both ways."

Judge Mihm replied as follows:

> "In his Aug. 9, 1999 pleading, entitled 'Response and Objections to Affidavit of William H. Campbell per bill of costs,' Mack moves the Court 'to hear arguments in chamber of irregularities and alleged improprieties' of State Farm and further moves the Court 'for an order of defendant to produce evidence showing proof of non-disparate treatment of plaintiff in the attempt to collect on bill of costs.' The court rejects both requests."

Frankly, as a United States Citizen and Armed Services Veteran, I was appalled at the District Court's nonchalance toward these allegations of Perjury, and what-have-you. I beg your Supreme Court to take these charges more seriously, for I possess proof, which space and time constraints prohibit my adding herein.

C. Procedural Background

With further regards as to my establishing a "Prima Facie" Case of Discrimination on the basis of Disability, I offer the following quotes from the Seventh Circuit's Order (Appendix – A), accompanied by my answers to same.

The last two pages of the Appellate Court Order (Appendix – A) contains the following statements that I refute:

> "To prove that he was fired due to his OCD, Mack had to establish a prima facie case of disability discrimination by proving that (1) he was disabled as defined by the ADA; (2) State Farm was aware of his

disability; (3) he was otherwise qualified for the job; and (4) he was terminated because of his disability. *See Foster v. Arthur Anderson, LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999)."

I, Timothy L. Mack, (1) have been diagnosed by no less than five Doctors, including State Farm's own "expert witness" Dr. Ratner, as having OCD (Obsessive/Compulsive Disorder). The Appellate Court conceded that OCD is recognized as a qualifying disability under the ADA. Further proof that OCD is a mental impairment under the ADA can be seen in EEOC Notice No. 915.002, dated March 25, 1997 (Appendix – D, p.40-A, item 1). (2) Your Plaintiff informed all concerned Management, Human Resources Representatives, and State Farm's Medical Department, including Dr. Zehr (Manager of Medical) of my OCD condition. (3) I more than demonstrated my qualifications for either the job in Audio-Visual and/or Public Affairs during my 20 years at State Farm. Testimonies in Court, plus the preponderance of evidence, would have sufficiently proved this point. (4) The preponderance of the evidence, depositions, and testimonies also would have shown that I was harassed, coerced, intimidated and interfered with due to my Disability and my filing suit, all actionable under Title 42 USC § 12203(a)(b). The "Wrongful Termination" was the most egregious retaliatory violation of my Civil Rights.

BUT – Termination need not be the fourth requisite for a "Prima Facie" Case of ADA Discrimination! Please be mindful that one's subjection to an "adverse employment activity", due to her/his Disability, alone is sufficient to fulfill the necessary requisites of a "Prima Facie" Case under the ADA. At the hands of the Defendant, I suffered "adverse employment activities", including, but not limited to, denial of ANY promotion due to my Disability! The Courts singularly mindedly and wrongfully found themselves

caught-up in the notion that Termination was the **only** fourth requisite to determine "Prima Facie" ADA Discrimination.

> "Under the ADA, two distinct categories of disability discrimination claims exist: failure to accommodate and disparate treatment. *Sieberns v. Wal-Mart Stores, inc.*, 125 F.3d 1019, 1021-22 (7th Cir.1997). In reasonable accommodation claims, a prima facie case mirrors the statutory elements. The statute provides that an employer discriminates against a qualified individual with a disability by not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability..." 42 U.S.C. § 12112(b)(5)(A). *Foster v. Arthur Anderson, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999)* [3]

REASONS FOR GRANTING THE WRIT

I. Most importantly, the Petition should be granted because the District Court's and the Seventh Circuit's decision conflicts with the burden shifting of proof framework as determined by Federal Rule of Civil Procedure.

The Courts, while considering Summary Judgment, and the showing of sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party, seems to have forgotten the all-important first step to shifting the burden of proof, in that the "[moving-]party seeking summary judgment always bears the initial responsibility of informing the District Court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits,..." Fed.Rules Civ.Proc.Rule 56(c), 28

U.S.C.A. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).*

I contend that the Defendant not only failed in its attempt to offer sufficient evidence "which it believes demonstrate the absence of a genuine issue of material fact" (necessary to prevail in a summary judgment) – I have also contend(ed) they LIED in their efforts to do so!

The Seventh Circuit Court has cited several cases involving the burden shifting framework and the necessary ingredients for a "Prima Facie" Case.

> "If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show that there is a genuine issue of material fact."...
>
> ..."The moving party may meet its burden of showing an absence of material facts by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Id.* at 323. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party." *Anderson v. Liberty Lobby, Inc.*

In the above cited excerpt the operative phrase is "**If** the moving party meets its burden..."! And, the second excerpt from *Anderson v. Liberty Lobby* states that the moving party has the burden of showing an absence of material facts supporting the non-moving party's case. The Defendant failed in their effort to show an absence of material facts on the part of the Plaintiff (i.e. although the Defendant tried, they did not show that I was without "Qualifying Disability"!) In fact, I believe the Defendant proffered facts, which in turn supported my facts, especially the entries of Dr. Ratner, the Defendant's "expert witness."

The majority of the Defendant's Statement of Uncontested Facts was non-substantive history and background, which proved nothing, and should have been declared immaterial.

I contend that the Defendant did not sufficiently meet their responsibility in proffering evidence in which a reasonable jury could find only in their behalf. The Defendant's Motion for Summary Judgment left much more than just "any doubt as to the existence of a genuine issue for trial [which thereby] is resolved against the moving party." *Anderson v. Liberty Lobby, Inc.*

Furthermore, the Judges in the Lower Courts filled in many of the blanks left by the Defendant, thus acting contrary to the following standard of summary judgment:

"At the summary judgment stage, the trial judge's function is **not** himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*

The Judges involved in these proceedings seemingly overstepped their bounds by adding personal feelings, conjecture, and judgments. This should be left to a jury.

In the light of all my Motions and Objections, especially my very first "Pro Se" Motion (the Amended Response to the Defendants Uncontested Facts – item III, below) it seems rather obvious that the evidence presents a sufficient disagreement, requiring submission to a jury.

Not only did the Plaintiff raise evidence presenting a sufficient disagreement to require submission to a jury – the Defendant Group themselves inadvertently raised such issues of disagreement by obvious contradiction. Therefore, presentation of such contradictory evidence presented a sufficient disagreement to require submission to a jury. In fact, much of the Defendant's proffered evidence, when seen

in the light of logic, ironically showed Material Issue of Facts in support of the Plaintiff's position. In short, there was no preponderance of the evidence, which is so one-sided that one party must prevail as a matter of law.

In example to the preceding paragraph, I am reminded of a passage from Judge Mihm's Order of the District Court. In light of the fight for my career, I present the Judge's terribly off-colored "pig" comment, in which he quotes from, ...*United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991) noting that "[j]udges are not like pigs, hunting for truffles buried in briefs" (See Appendix – B, p. 30-A)

In recourse, I would like to allude to another "out-of-place", "off-color" comment about pig(s). I offer the adage, "even a 'Blind Pig' can find an acorn once in a while"! This is especially true when the acorn is as big as a house.

With your indulgence, and following this logic, that Judges should not have to hunt for the little truths (truffles), I pose the following question. Why didn't the Judges in these matters see the obvious contradiction, a "Giant Acorn" (LIE) on the part of the Defendant, and Mr. Roesler? Why is it they could not stumble across, even blindly, this "giant acorn" right in front of them?

Consider this... The Defendant stated as fact(s) that as Management they were not aware of my "Mental Disability" until late October of 1996, when I met with my Manager John Rosenstock.

Here sits this "Giant Acorn" that the Courts never "stumbled upon"! ...In other "Uncontested Facts" the Defendant Group cited that my Cardiologist in mid-September of 1996 initially released me to return to work. Yet, I did not do so. They, through Mr. Roesler, wrongfully stated that I chose to continue to remain on PSL (Personal

Sick Leave) until after receiving a second release from my Psychologist. Although, it is true I remained out from work, the fact is that I was "locked-out" from work by State Farm and required to obtain a release from my Psychologist before I was allowed to return! The point of whose idea it was for me to remain on sick leave is moot when it comes to the "Acorn Analogy" presented herein. In either scenario, whether I stayed out on my own volition, or I was "locked-out" by the Defendant, State Farm did not (nor would they ever) allow a person to remain on extended sick leave without knowing why!

So, it was made obvious by the Defendant's own inadvertent admission, they did indeed know of my Disability prior to the date they claimed in their so-called "facts" – **perjuries**! With all due respect, the only problem was that none of the "blind pigs" (Judge Mihm's analogous reference of choice) bumped into this "giant acorn"! Is it a small lie? Consider the fact that Management probably had to know well before their decision in September to extend my Sick Leave! In fact, I presented a document, an exhibit, to the Courts clearly showing that my OCD was noted on a State Farm "Medical Alert" in April of 1996.

NOTE: The point of who initiated the "extended sick leave" is not moot in consideration of two other vital points. First, in light of the "lockout" from work, which involved said release, I contend this action of "lockout" by the Defendant State Farm, was in violation of my ADA Civil Rights under Title 42 U.S.C. § 12203 (a)(b) – being both Retaliatory as well as Interfering. Furthermore, the Courts were made aware of said "lockout", but wrongfully did not consider this as a Material Issue of Fact in support of the Plaintiff's case!

Secondly, the contradiction of the "facts" presented

by State Farm shows there were untrue statements of the "facts" involved, which should be considered perjurious, since these lies came from Depositions, Affidavits, and the so-called "Uncontested Facts"!

II. The Petition should be granted because the District Court did not allow the Plaintiff ample opportunity to respond to the Defendant's Motion for Summary Judgment, specifically, the 101 so-called "facts" presented within the Defendant's Statement of Uncontested Facts.

As the Court can see from the Seventh Circuit's decision, my Attorney, made objections to 17 of the 101 "Uncontested Facts" proffered by the Defendant (Appendix – A, p.7-A, & Appendix – B, p.13-A) The District Court overruled the 17 objections, and did not allow any further response from the Plaintiff, either affirming or denying any of the 101 so-called "facts." Although I realize this is not an isolated incident, I truly feel that the Supreme Court could clear up this most awkward legal issue. In essence, if the same rules applied to the Courtroom, any objection, overruled, would be a credit to the opposition, and demand no answer. This obviously would not work. So, why should it work at the Summary Judgment stage?

III. Moreover, the Seventh Circuit disallowed my Amended Response to the Defendant's Statement of Uncontested Facts. Suddenly, I was a "Pro Se" Plaintiff, hastily thrust into my "baptism of fire"! And, contrary to the Seventh Circuit's Order – I filed the Motions in question in a timely manner!

As mentioned above, my very first "Pro Se" Motion was a Response and Objections to the Defendant's Motion

for Summary Judgment and Statement of Uncontested Facts. A Deputy Clerk of the District Court told me that I had a 30-day window in which to make my "Pro Se" reply in the form of a Motion to Reconsider. Unfortunately, this document had to be submitted in that form due to my Attorney's negligence. My Attorney gave me absolutely no opportunity to peruse the Defendant's Motion for Summary Judgment and Uncontested Facts. He also gave me NO opportunity to peruse his response to same! When Mr. Barry finally found the time to communicate the bad news to me – it was too late! During my meeting with Mr. Barry we both realized the mess that had been made. I laid-out my expectations of his future performance, at which time he quit my services.

Contrary to the Seventh Circuit's opinion as to the timing of my entry as a "Pro Se" Litigant into these matters, I was forced to handle these issues during the Summary Judgment stage. The Appellate Court cited cases in which they gave "Pro Se" litigants more latitude (Appendix – A, p.7-A, para. 2). In the aforementioned passage they wrongfully stated that I was not proceeding "Pro Se" during Summary Judgment (refer to my listing of the events on the following pages).

"...Mack submitted this evidence to the district court in his memorandum of law in opposition to State Farm's summary judgment motion and in later filings in the district court and this court. The district court, however, was not obligated to consider untimely-presented evidence, and neither are we." (Appendix – A, p. 9-A)

As for the submission of my so-called "memorandum of law in opposition to State Farm's summary judgment" – said document was my amended, and timely-filed "Response and Objections to Defendant's Statement of Uncontested Facts" (see Questions Presented #3, p. ii).

I offer the following as a brief description of what transpired during the critical period in question:

- I briefly communicated with my Attorney around the time the Defense submitted their bid for Summary Judgment (December 1998). At that time my Attorney told me that he would send the Defendant's Motions to me for my perusal and input. He also said we would secure an affidavit from my psychologist – NEITHER OF WHICH HAPPENED!

- I attempted to contact my Attorney on several occasions thereafter. In an effort to show him my feelings about communicating, I called him at home in early April to get a status report on the pending Motions. He was very unhappy I called him home, and said that he would get in touch with me the moment he heard something.

- April 15, 1999 – the District Court found in favor of the Defendant's Motion for Summary Judgment.

- Approximately eight days later I called my Attorney, since I had not heard from him as he promised. (***NOTE:*** During this time, I was making weekly calls to the Clerk's Office of the District Court. So, I found out about the Court's decision before communicating with my Attorney.) When I finally got in touch with my Attorney, I was understandably upset.

- We met the following day, at which time he quit.

- I requested all paperwork from the proceedings at which time he refused to release them until he could have them copied. (***NOTE:*** There were thousands of pages to be copied, so I did not receive these papers for another week.)

- This two-week delay caused me great problems in my attempt to "pick up the pieces"!

- During this waiting period I called the District Clerk's

Office to affirm, and reaffirmed the deadlines for the necessary paperwork that lie ahead. The Deputy Clerk informed me that I had 30 days in which to present my Motion to Reconsider, and a Notice of Appeal if needed. I recall specifically asking the Deputy Clerk if I had an additional 30-day window in which to submit my Notice of Appeal if it became necessary. I was told, "NO" by the Deputy Clerk, and that "all paperwork had to be in their hands within the 30-day limit."

- With over two weeks wasted by my ex-Attorney, I had to hustle to submit my response to the Defendants Statement of Uncontested Facts, which I was seeing for the first time.

- Due to the time constraint, I submitted my Response and Objections to the Uncontested Facts in support of Summary Judgment on May 13, 1999, the day before the 30-day deadline!

- Since I was instructed I had to do so by the Clerk's Office, I submitted my Notice of Appeal on the following "DEADLINE" Day May 14, 1999. I was under the assumption that my submission of my Motions the previous day (within the deadline) would make them a matter of record for the Appellate Court to consider.

- Judge Mihm stated in his docket minutes regarding my Notice of Appeal that he no longer had jurisdiction over the amended response to the facts, since I, the Plaintiff, had filed the Notice of Appeal.

- The Appellate Court gave little, to no, consideration to my amended response, as seen by their response quoted above, which referred to my document in a somewhat understated manner by saying it was my "...memorandum of law in opposition to State Farm's summary judgment motion and in later filings in the district court and this court. The

district court, however, was not obligated to consider untimely-presented evidence, and neither are we." (***NOTE:*** Contrary to the Circuit Court's misguided opinion, the documents in question were submitted in a timely manner. They were produced under greatly adverse circumstances! These circumstances have made me OBSESS about the politics of Justice! If your Petitioner seems sardonic by my past dealings with the Courts, it is due in part to my Obsessive/Compulsive nature. For that, I beg the U.S. Supreme Court's indulgence.)

IV. The Petition should be granted because the District Court blatantly disregarded the Plaintiff's plea to the Court begging consideration of the Defendant's improper, and illegal actions in the form of misleading statements, lies, perjury, and theft/destruction of evidence.

As I previously stated, I attempted to bring to the attention of the District Court the Defendant's unlawful attempts (and apparent successes) to "bend or break" the truth concerning some very salient points of issue. The District Court gave me my first dose of despair with their denial of my "Motion to Meet in Chambers" regarding these irregularities and improprieties!

V. The Supreme Court should grant my Petition in order to consider an addendum to Title 42 U.S.C. § 12101 et seq. that makes a necessary allowance for any employees, who are deemed "able" to work at the onset/initiation of any proceedings, to continue with their complaints as members of a "protected" group, regardless of the fact or possibility that they may no longer be able to perform their jobs, through no fault of their own!

I feel that the Defendant may have purposefully or inadvertently set a course of action to exacerbate my condition in order to gain a favorable position with the Courts. In any event, I beg the Court to take away the remote possibility of this course of action, by adding a much-needed addendum to the existing Law covering Disabilities. Such addendum would increase the probability that the Courts would come to a conclusion with all of the facts. In my case, the Appellate Court obviously did not take into consideration my "ability" to perform the duties of my job at the time my cause was initiated, and the lawsuit was filed.

The Appellate Court's decision is drastically wrong. It lacks the sensibility of good logic. The Court essentially admitted their awareness of my newly acquired inability to cope with a "toxically charged", "life threatening", "hostile environment"! Yet, they dismissed my case, in part, due to their misguided decision that I was no longer "able" to work. They declared me to be "totally/completely disabled" without regarding my ability to work at the time the Lawsuit was filed. [***NOTE:*** LTD (Long Term Disability) is not necessarily a permanent situation/condition – as the Appellate Court unilaterally deemed it to be, by their wrongful declaration of my being "totally disabled"!]

CONCLUSION

I feel that a decision by the Courts, based on LIES, can not be a righteous decision! During the three years of these proceedings I have reached points of despair thinking there is no Justice, only politics and the polished words and phrases of the Courts and its officials. It greatly dismays me to think that any one party, to any proceeding, can escape their culpability by use of the "TALL TALE"!

I hope that State Farm will not walk away unscathed!

APPENDIX – A

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 20, 2000*
Decided January 21, 2000

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 99-2315

TIMOTHY L. MACK,
Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Central District of Illinois.

No.97 C 1207

Michael M. Mihm,
Judge.

ORDER

Fifty-one year old Timothy Mack has suffered from Obsessive-Compulsive Disorder (OCD) since the *fifth* grade. The Equal Employment Opportunity Commission (EEOC) recognizes OCD as a psychiatric disability under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12111.

*After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

Mack sued his employer, State Farm Mutual Automobile Insurance Company, under the ADA and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-624, claiming that State Farm twice failed to promote and eventually terminated him on the basis of his OCD and age. The district court granted summary judgment to State Farm, concluding that one of Mack's failure-to-promote claims was untimely, and that no genuine issue of material fact for trial existed for trial on his remaining claims. Now pro se, Mack appeals, arguing that his time-barred claim was part of a continuing violation of his civil rights, and that he presented sufficient evidence to survive summary judgment on his other claims. We affirm.

Mack joined State Farm as an Art and Design Supervisor in its Audio Visual (AV) Department in 1977. State Farm employees receive annual performance reviews, and favorable reviews - "expected," "exceptional," or "performance exceeds expected" - result in annual salary increases, whereas unfavorable reviews do not. Mack received an "expected" rating at his first performance review. In 1979, however, he was caught smoking marijuana while on business in a company-owned car, and as a result received a "below expected" review and no raise for the following year. Over the next decade, however, Mack's supervisors generally rated him "expected," but he was not promoted despite his requests in 1986 and 1990.

Mack first realized that he had OCD in 1988 or 1989. Between 1989 and 1992, Mack's supervisors rated him "performance exceeds expected," "expected," and "exceptional," respectively. He was not satisfied with his 1993 "exceptional" review, however, and he started writing letters to State Farm executives expressing his frustration over his lack of advancement and objecting to company

policies. In a 1994 letter to President Ed Rust, Mack explained that he was attempting to put his career "back on track" following the marijuana incident 15 years earlier Mack's supervisor rated him "expected" in 1994, and a psychiatrist formally diagnosed him with OCD in April 1995. Mack began therapy, but quit after 10 weeks.

In July 1995, Mack requested promotion to Superintendent of Art and Design. His supervisor rejected his request, however, and promoted Mike Pertinac [sic – correctly spelled "Petrinec"] to the position. Instead of a promotion, Mack received a lateral transfer to the Public Affairs Department, which he considered a "good move," but he nevertheless immediately consulted an attorney regarding possible legal action. The following spring Mack informed his supervisor, Barry Lowe, that he was taking medication for OCD, stating that he did not want Lowe to "fire him for drugs" if he ever observed Mack taking medication at work. Mack also discussed his career with Lowe, and explained that he desperately needed a promotion to satisfy his compulsion to be recognized for his achievements. Lowe, who would leave Public Affairs in 1996, did not act on Mack's request. Mack then sought the position vacated by Lowe, but Mike Livingston[1] refused to promote him on four grounds: (1) he "[saw] things through sunglasses, not as they truly [were]"; (2) he "carr[ied] around a lot of excess baggage"; (3) he "fail[ed] to let go of the past"; (4) he "inconsistently answer[ed] the same question at different times"; and (5) he had trouble getting along with another AV Department employee. Mack believed that the first four reasons were merely symptoms of his OCD, and asked Livingston if he was aware of his condition.

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[1] The record does not specify what supervisory position Livingston held at State Farm.

Livingston replied only that he did not know what OCD was, and he and Mack did not further discuss OCD.

Shortly thereafter, after consulting with Livingston, Director of Public Affairs John Rosenstock selected 38 year-old Ronald Reeves over Mack to replace Lowe. Rosenstock believed that Reeves was the best candidate for the job because Reeves had received better performance ratings than Mack, had broader experience with State Farms's [sic] business, including management, claims, agency, estimating, underwriting, disaster, and subrogation had specialized insurance training, and was actively involved in outside insurance organizations and community volunteer work. Reeves had also completed more company-sponsored education courses than Mack, who had no claims, agency, estimating, or underwriting experience, and was not involved in outside insurance or volunteer organizations. After learning that Reeves was promoted instead of himself, Mack immediately reported to State Farm's Medical Department, and the following day had what he described as a "panic attack." He took a short vacation and returned to work, but suffered a heart attack in August, requiring five days' hospitalization. Mack's cardiologist released him to return to work without restriction in September 1996, but a clinical psychiatrist postponed Mack's return date until October.

Several weeks after returning to work, Rosenstock met with Mack to review his performance, and criticized Mack's work up to and immediately following his heart attack. Mack informed him that he suffered from OCD, but Rosenstock stated that did not know what OCD was. Mack did not indicate that OCD limited his ability to work, and they did not further discuss OCD. Mack left the meeting angry, and rather than returning to work immediately checked into the Medical Department, which placed him on

a leave of absence until July 1997. While on leave, Mack filed age and disability discrimination charges with the Equal Employment Opportunity Commission (EEOC), received a right-to-sue letter, and filed this lawsuit represented by counsel.

He returned to work in July 1997 as scheduled under a new supervisor, Rock Jenkins, who was also unaware of Mack's OCD. In December 1997, Jenkins met with Mack to review his performance following his return to work. Jenkins criticized Mack's work, and Mack left the review angry, proceeding straight to the Medical Department. Two days later he again met with Jenkins, and Jenkins criticized his conduct following the earlier performance review. Mack immediately returned to the Medical Department and was placed on medical leave. Five months later he submitted a claim form asserting that he was completely disabled and unable to return to work because his job placed him "in a life-threatening position dealing with the extreme hostile work environment." State Farm's Medical Department never released Mack to return to work.

During a June 1998 deposition for this lawsuit, State Farm asked Mack what accommodation he needed to return to work. Mack replied that he wanted "a guarantee to be left alone," but could not explain who should leave him alone. Dr. Richard Ratner, a forensic psychiatrist retained by State Farm, examined Mack two weeks later and confirmed that Mack suffered from OCD. Dr Ratner opined that although Mack's OCD did not limit his major life activity of working, Mack's paranoia and obsessive behavior "poisoned the well" of his employment at State Farm, rendering State Farm "uniquely a place where [Mack] will not be able to return to work." When Dr. Ratner asked Mack what he would do if he lost his case, Mack answered that he would look for another

job. Dr. Timothy Roberts, Mack's physician, completed Mack's disability claim form in July 1998, stating that Mack's prognosis was "guarded to poor," and that he did not know when Mack could return to any type of employment. Dr. Roberts also completed a group long-term disability form for Mack, in which he stated that Mack was incapable of performing his occupation and that his present position could not be modified to "allow for handling with impairment." Citing Mack's failure to return to work prior to exhausting all of his leave benefits, State Farm fired him in October 1998.

After discovery, the district court granted summary judgment to State Farm, concluding that one of Mack's failure-to-promote claims was time-barred, Mack could not show that State Farm's legitimate, non-discriminatory reasons for failing to promote him and terminating him were pretextual, and Mack was not a qualified individual with a disability under the ADA. We review *de novo* a grant of summary judgment, considering the evidence and all inferences that might be drawn from it in the light most favorable to the non-moving party. *Green v. National Steel Corp.*, 197 F.3d 894, 897 (7th Cir. 1999). In employment discrimination cases such as this, where motive and intent are at issue, this standard is applied with added rigor. *Roberts v. Separators, Inc.*, 172 F.3d 448, 450 (7th Cir. 1999).

Mack initially complains that the district court failed to consider the evidence in the light most favorable to him, accepting only State Farm's version of events rather than his own, and ignoring additional salient facts in his response and accompanying memorandum to State Farm's summary judgment motion. But Mack failed to dispute or properly respond to State Farm's statement of uncontested facts

submitted pursuant to Central District of Illinois Local Rule 7. 1(D)(1). Consequently, he admitted as true the facts set forth in State Farm's Rule 7. 1(D)(1) statement. *See Midwest Imports, Ltd. v. Coval,* 71 F.3d 1311, 1313 (7th Cir. 1995) (applying similar local rule in the Northern District of Illinois). Mack's 17 objections to State Farm's 101 numbered paragraphs did not explain why he disputed or denied the truth of State Farm's submitted facts, nor did he cite to the record for support, as required by Rule 7.1(D). Any additional facts raised in Mack's memorandum opposing State Farm's summary judgment motion were not properly before the district court, and likewise are not considered by us. *See Schneiker v. Fort is in£ Co.,* F.3d ___ No 99-1437, 2000 WL 10251, at *1 (7th Cir. January 6, 2000).

Mack asks that we overlook his failure to properly object to State Farm's facts and consider his additional facts because he is proceeding pro se. We do not hold the pleadings of pro se litigants to the same standards of licensed attorneys, *Kyle v. Patterson,* 196 F.3d 695, 697 (7th Cir. 1999), but Mack was not proceeding pro se during summary judgment proceedings in the district court, and we have consistently upheld the strict application of similar local rules in other districts in this circuit, *e.g., Waldridge v. American Hoeschst Corp.,* 24 F.3d 918, 922 (7th Cir. 1994) (citing cases and similar rules). Mack also complains that his lawyer was ineffective, but he misconstrues the Sixth Amendment right to counsel, which applies to criminal, not civil, cases. Apart from a limited due process right to counsel in narrow circumstances not present here, the guarantee of effective assistance of counsel is not applicable in civil cases. *Pokuta v. Trans World Airlines, Inc.,* 191 F.3d 834, 840 (7th Cir. 1999). We cannot vacate a judgment and grant a new trial in a civil case on the basis of a claim that counsel

may have rendered ineffective assistance. *United States v. 7J08 West Grand Avenue,* 15 F.3d 632, 635 (7th Cir. 1994).

Proceeding then to the merits, Mack challenges three alleged discriminatory acts: the July 1995 promotion of Mike Pertinac [sic]; the July 1996 promotion of Ron Reeves; and his 1998 termination. The district court concluded that the July 1995 claim was time-barred. Complainants must file charges with the EEOC within 300 days of the alleged discriminatory act. *Filipovic v. K & R Express Systems, Inc.,* 176 F.3d 390, 396 (7th Cir. 1999). Therefore, because Mack filed his EEOC charges on November 21, 1996, any claim based on alleged discriminatory acts occurring prior to January 26, 1996 is barred by the statute of limitations. Mack argues, however, that Pertinac's [sic] promotion over him was part of a continuing violation of his civil rights. Plaintiffs can litigate adverse employment actions based on acts occurring outside of the statute of limitations only if the discriminatory nature of the acts was not evident when they occurred. *Hardin v. S.C. Johnson & Son, Inc.,* 167 F.3d 340, 344 (7th Cir. 1999). The record shows that shortly after State Farm promoted Pertinac [sic] over Mack in 1995, Mack discussed filing an age-discrimination lawsuit against State Farm with the same law firm that represented him in the district court. Mack therefore was aware of the alleged discriminatory nature of Pertinac's [sic] promotion over him, and the district court correctly concluded that this act was not part of a continuing violation of his civil rights.

Next, Mack contends that Reeves was promoted to Lowe's former management position over him because Reeves was ten years younger. The district court concluded that Mack established a prima facie case under the ADEA, but failed to show that State Farm's reasons for choosing Reeves over him were pretextual. State Farm claimed that

Reeves had better performance evaluations, more experience, and more education than Mack. Mack did not dispute these reasons; instead Mack asserts that State Farm did not honestly hold them because Reeves's [sic] reviews were not as good as State Farm claimed, Reeves did not have public relations experience, and Reeves "did not last in Public Affairs - he was gone in approximately a year's time." Mack submitted this evidence to the district court in his memorandum of law in opposition to State Farm's summary judgment motion and in later filings in the district court and this court. The district court, however, was not obligated to consider untimely-presented evidence, and neither are we. *Uhl v. Zalk Josephs Fabricators, Inc.*, 121 F.3d 1133, 1135 (7th Cir. 1997). As to Mack's claim that he was terminated because of his age, his initial burden was to show (1) he was in the protected age group of 40 or older; (2) he was performing his job satisfactorily; (3) he was discharged; and (4) a similarly-situated younger employee took over his position. *See Pitasi v. Gartner Group, Inc.*, 184 F. 3d 709, 716 (7th Cir. 1999). Mack presented no evidence that a younger employee replaced him after State Farm terminated him, and we agree with the district court that Mack failed to establish his prima facie case of age discrimination with regard to his termination.

Mack also claims that he was passed over for promotion because he has OCD. The district court assumed that Mack could prove his prima facie case under the ADA, but went on to conclude that Mack failed to come forward with any evidence showing that State Farm's reasons for not promoting him were pretextual. We agree. State Farm stated that it believed that Reeves was the best candidate for the job. Def's Stmt. Uncontested Facts at 17, ¶ 62 (R. at 50). Mack did not dispute or object to this statement, and accordingly admitted it as true. *Cf. Schulz v. Serfico Ltd.*, 965

F.2d 516, 519 (7th Cir. 1992) (affirming summary judgment where plaintiff admitted that defendant honestly believed its legitimate, non-discriminatory reason for taking adverse action).

To prove that he was fired due to his OCD, Mack had to establish a prima facie case of disability discrimination by proving that (1) he was disabled as defined by the ADA; (2) State Farm was aware of his disability; (3) he was otherwise qualified for the job; and (4) he was terminated because of his disability. *See Foster v. Arthur Anderson, LLP,* 168 F.3d 1029, 1032 (7th Cir. 1999). Mack's own physician stated that it was "unknown" when Mack would be able to return to work, and Mack did not dispute that State Farm believed he could not return to work. Nothing in the ADA requires an employer to provide an employee with an indefinite leave of absence, *Nowak v. St. Rita High Sch.,* 142 F.3 d 999, 1004 (7th Cir. 1998), and employers are entitled to take employees and their physicians at their word when they represent that they are totally disabled and completely unable to return to work, *Feldman v. American Mem iLife Ins. Co.,* 196 F.3d 783, 791 (7th Cir. 1999). It was Mack's burden to show that he was willing and able to come to work on a regular basis in October 1998, *see Nowak,* 142 F.3d at 1003; he did not do so, and thus he was not otherwise qualified for his position.

Mack asserts, however, that he would have returned to work if State Farm had made reasonable accommodations for him. He suggested that State Farm should "leave him alone," and allow him to remain at his desk without interaction with management until be reaches retirement age. An employer may be required to reassign a disabled employee to a different position if the employee can no longer perform the essential functions of their current position, but is not obligated to create a new position or to

provide the accommodation that the employee requests or prefers. *Malabarba v. Chicago Tribune Co.,* 149 F.3d 690, 699 (7th Cir. 1998): We believe that Mack's preferred accommodation would create an undue hardship on State Farm, *see id.*, and therefore is not reasonable.

Accordingly, we AFFIRM the judgment of the district court.

APPENDIX – B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

FILED
APR 15 1999
JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

TIMOTHY L. MACK,
Plaintiff,

vs. Case No. 97-1207

STATE FARM INSURANCE COMPANIES and
STATE FARM MUTUAL AUTOMOBILE COMPANY,
Defendants.

☑ **DECISION BY THE COURT.** This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to an endorsed order dated January 23, 1998, Defendant State Farm Insurance Companies is terminated. IT IS further ORDERED AND ADJUDGED that this case is terminated plus costs.

ENTER THIS 15TH DAY OF APRIL, 1999
s/ John M Waters
JOHN M. WATERS
s/ W Willett
BY: DEPUTY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

FILED
APR 15 1999
JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTAL DISTRICT OF
ILLINOIS

TIMOTHY L. MACK,)
Plaintiff,)
)
v.) Case No. 97-1207
)
STATE FARM MUTUAL)
AUTOMOBILE INSURANCE)
COMPANY,)
Defendant.)

ORDER

This matter is before the Court on Defendant, State Farm Mutual Automobile Insurance Company's ("State Farm"), Motion for Summary Judgment. For the reasons stated herein, the Motion is GRANTED. This case is TERMINATED.

FACTUAL BACKGROUND

The facts in this case are completely undisputed. Although Plaintiff, Timothy Mack ("Mack"), objects to 17 of 101 statements of undisputed fact offered by State Farm in support of its Motion for Summary Judgment, he does not deny the truth of the matter asserted in the 17 statements of fact. Accordingly, the Court deems those 17 statements of fact to be admitted to by Mack. See CDIL-LR 7:1(D)(2), (D)(3). Where the Court uses a statement of fact objected to by Mack, it will address why the objection is overruled. Mack has not offered any additional statement of undisputed facts in support of his Response to the Motion for Summary

Judgment. See CDIL-LR 7.1 (D)(3) ("If the party opposing summary judgment relies on additional facts in response and the facts are not numerically listed, they will not be considered by the court.").

Mack was born in December 1947. From fifth grade until present, Mack has known that he suffers from some sort of compulsive psychological disorder. This type of condition was not labeled "obsessive compulsive disorder" ("OCD") until 1989-1990.

On April 1, 1977, Mack began working at State Farm at a starting salary of $15,024 per year. He was hired as an Art & Design Supervisor in State Farm's Audio Visual Department ("A/V Department") and was assigned a MA-4 job classification, which was three job classifications above the typical entry level classification for professional positions at State Farm. Effective December 9, 1978, Mack received an expected" job performance review and an annual salary increase.

In November 1979, Mack was involved in a marijuana smoking incident with four other State Farm employees. Mack, who was the supervisor in charge, allowed marijuana smoking to occur in a company car on a company-sponsored field trip.[1] Subsequent to this incident, Mack was given a "below expected" job performance review and was not given an increase in salary for the upcoming year. Effective December 6, 1980, Mack received an "expected" job performance review and an annual salary increase.

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[1] The Court overrules Mack's objection to this statement of fact, which he claims is unfairly prejudicial and irrelevant. In light of the fact that Mack explicitly admits to the statements of fact in paragraphs 44 and 95 of State Farm's Statement of Undisputed Facts, which state that he believed his lack of progress at State Farm was causally related to this incident, the Court fails to appreciate the merit of Mack's objection.

Between 1980 and 1986, Mack received successive "expected" job performance reviews and corresponding salary increases.

In July 1986, Mack presented a proposed action plan to his supervisor, Marv Winchester ("Winchester"), in which Mack would be promoted from an MA-4 to a MA-5 job classification. Mack was told by Winchester that he "wasn't so sure that [Mack's] file didn't have something in it" that would always keep Mack at the MA-4 level. (Dft. SUF, ¶ 28). At the same time, Mack was keeping notes on his lack of progress at State Farm. Among other things, his notes included references to "discrimination" and legal proceedings against State Farm. Between 1986 and 1990, Mack received successive ratings of "expected" job performance and corresponding salary increases. He continued to complain about his lack of progress with State Farm.

In either 1988 or 1989, Mack first realized that OCD was the name of his psychological condition that he was first counseled for in elementary school. At some time between 1989 and 1990 and over the course of six to nine months, Mack received mental health counseling from a Catholic Social Services therapist for his frustrations at work. On January 11, 1990, Mack wrote a memorandum to his then supervisor, Larry Meyer ("Meyer"). He told Meyer that he was seeking a promotion and noted that he had received no promotions nor had he exceeded expected ratings during his time at State Farm. According to Mack, it was disheartening to see his colleagues promoted while he was not. There is no indication in the Statement of Undisputed Facts whether Meyer responded to the letter.

On December 7, 1991, Mack received a "performance exceeds expected" job performance review

and an annual salary increase to $58,325.01. In December 1992,

Mack received an "expected" job performance review, and in December 1993, he received an "exceptional" job performance review. The 1992 and 1993 evaluations came with annual salary increased to $61,195.41 and $64,375.65, respectively. Mack, however, was dissatisfied with his "exceptional" rating in 1993 and believed he should have received the higher rating of "exceeds" job expectations.

In 1994, Mack began writing letters to various State Farm executives, expressing his frustration over his lack of advancement in the company and the manner in which State Farm handled an offer to employees to purchase television sets used by the company at a convention. In a November 13, 1994 letter to State Farm's president, Ed Rust ("Rust"), he explained that ever since the marijuana incident in 1979 he had been trying to get his career "back on track while dealing with a great deal of frustration." (Dft. SUF, ¶ 44). He further explained that an "all-time low came early [in 1994]. It occurred when Joe Anderson ["Anderson"] told [him] that he would not recommend [him] for a Public Affairs position in any Region." *(Id.)*. According to Mack, Anderson did not explain why he would not recommend him for the position. At the end of 1994, Mack received an "expected" job performance review and an annual salary increase to $67,385.25.

In April 1995, Mack was diagnosed by a psychiatrist, Dr. Paturi, as having OCD. After 10 weeks of counseling sessions, Mack quit attending. In July of 1995, Mack claims that he was a victim of age discrimination when he was denied the opportunity to advance to the position of Superintendent of Art & Design. During that same month, he

began discussing the possibility of a lawsuit against State Farm with an attorney because of his lack of progress with State Farm. Mack had a couple of discussions with the attorney over the course of the year that followed.[2]

In August 1995, Mack took a lateral transfer to State Farm's Public Affairs Department at his same salary and job class, MA-4. After accepting the position of Public Affairs Specialist IV, he began reporting to Barry Lowe ("Lowe"). Mack viewed this move as a "good move. Effective December 2, 1995, Mack received an "expected" job performance review and an annual salary increase to $70,000.56. In April 1996, Mack first informed Lowe that he was taking medication for OCD so that "if he ever saw [Mack] taking medication at [his] desk [he] wouldn't be canned for drugs." (Dft. SUF, ¶ 56).

In May 1996, Mack had a discussion with Lowe concerning his career opportunities within Public Affairs. According to Mack, the meeting "was yet another discussion of my desperate, OBSESSIVE need to have my career advanced." (Dft. SUF, ¶ 57). He felt that he made it quite clear during that discussion and prior discussions that he desperately needed a promotion because, in part, a promotion would have been part of the closure needed for his compulsion to be recognized for his achievements.

Lowe left Public Affairs in June 1996. At that time Mack began reporting to John Rosenstock ("Rosenstock"), Director of Public Affairs. On July 11, 1996, Mack met with Mike Livingston ("Livingston") to discuss his career at State Farm and the possibility of him being considered for Lowe's

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[2] Again, the Court overrules Mack's objections on the alleged ground of relevancy. These facts are probative of the statute of limitations argument raised by State Farm in its Motion for Summary Judgment.

vacant managerial position. Livingston stated that for a number of reasons Mack would not be considered for the manager's position, including: (1) Mack saw things not as they truly were; (2) he carried around excess baggage; (3) he failed to let go of the past; (4) he inconsistently answered the same questions at different times; and (4) he had problems getting along with another employee in the A/V department. Mack viewed a number of the reasons given by Livingston as symptoms of his OCD. He then asked Livingston, "You do realize that I have OCD, which may lend itself to your perceptions, don't you?" (Dft. SUF, ¶ 60). Livingston replied, "I don't even know what OCD is." *(Id.)*. This was the first and only time that Mack discussed or referred to his OCO with Livingston.

Lowe's former management position was awarded to Ronald Reeves ("Reeves"). At the time, Reeves was 38 years old, and Mack was 48 years old. The decision to award Reeves with the position of manager was made by Rosenstock in consultation with Livingston because Reeves was viewed as the best candidate for the job. It is undisputed that: (1) Reeves received a "performance exceeds expected" rating on his last performance review, while Mack received an "expected" performance review rating; (2) Reeves had experience in various aspects of State Farm's business to include management, claims, agency, estimating, underwriting, special disaster, and subrogation, while Mack had no claims, agency, estimating, or underwriting experience; (3) Reeves had been actively involved in several insurance organizations outside State Farm and had completed some professional insurance courses, while Mack was not involved in any external organization and had not taken any professional insurance courses; (4) Reeves was actively involved and held office in many community volunteer organizations, while Mack was not known to have

any involvement in any such organizations; and (5) Reeves had completed approximately twice as many company-sponsored education courses.

After being told by Livingston that he would not be chosen to replace Lowe, Mack went to the State Farm Medical Department. He reported to the Medical Department that everything had been going well since his lateral transfer to Public Affairs until he was told by his supervisor during a career path evaluation that his projects were not up to date. On July 12, 1996, the day following his visit to the Medical Department, Mack had what he described as a panic attack. It was the first he had ever had. He subsequently went on vacation with his family to an amusement park in Ohio. Approximately two weeks later, on August 5, 1996, he suffered from a heart attack. He was hospitalized for five days.

Mack was released to return to work on September 19, 1996, by his cardiologist without any restrictions. His return to work date was then extended by Dr. Feli Sebastian, a clinical psychiatrist, until October 2, 1996. The only restriction placed on Mack by Dr. Sebastian was that Mack had to work half-days for a period of two weeks.

On October 29, 1996, Mack met with Rosenstock for a performance review, which was critical of Mack's performance up to the point of the heart attack and the two weeks following his return from leave. It was during this review that Mack made his first and only reference to OCD in Rosenstock's presence. Rosenstock was otherwise unaware that Mack had any such condition, and when Mack referred to OCD, Rosenstock had no idea what it was and was not given any indication from Mack that the OCD limited his ability to work. After his performance review, Mack reacted angrily toward Rosenstock. In his daily record

of notes, Mack wrote, "John kicked my ass!!! (or he tried to!) End of Round #1!!"

Believing that Rosenstock's evaluation was unfair, Mack went to the Medical Department rather than returning to work on October 29, 1996. After October 29, 1996, Mack was placed on a medical leave of absence and until July 15, 1997, when he was released to return to work without restrictions. During his leave of absence, Mack filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on November 21, 1996, alleging age and disability discrimination. Mack did not use the term "OCD" or "obsessive compulsive disorder" in this EEOC charge. Instead, he stated that he had a "permanent disability." (Dft. Ex. 24, EEOC Charge).

Upon his return to work in July 1997, Mack was assigned a new supervisor, Rock Jenkins ("Jenkins"). Jenkins was unaware that Mack had OCD. On December 16, 1997, Mack met with Jenkins for a performance review. In his review, Jenkins was critical of Mack's job performance. Believing that the evaluation was unfair, Mack went to the Medical Department rather than returning to work. Mack returned to work the following day, December 17, 1997. On December 19, 1997, Jenkins met with Mack and criticized his conduct following the December 16, 1997 performance review. Believing that this criticism was also unfair, Mack again went to the Medical Department rather than returning to work. Since December 19, 1997, Mack has never been released to return to work. On April 29, 1998, Mack completed a total disability claim form asserting that returning to work "puts [him] in a life threatening position dealing with the extreme hostile work environment."

During his June 4, 1998, deposition, Mack was asked what accommodations he wanted or needed in order to return

to his job. He replied, "I want a guarantee to be left alone." When further asked to specify who it is at State Farm that must leave him alone, Mack replied, "I can't. I can't answer that question. I don't know who it would be...

On June 11 and 12, 1998, Dr. Richard Ratner, a forensic psychiatrist retained by State Farm as an expert in this case, performed a full psychiatric evaluation of Mack. In Dr. Ratner's opinion: (1) Mack suffers from OCD; (2) his psychiatric conditions do not limit the major life activity of working, although Mack's paranoia and obsessionalism have combined to "poison the well" of his employment at State Farm; and (3) State Farm is uniquely a place where Mack will not be able to return to work. When asked by Dr. Ratner during the evaluation what he would do if he lost this lawsuit against State Farm, Mack replied that he would look for other employment.

On July 23, 1998, Dr. Timothy Roberts completed the "attending physician" section of the total disability claim form submitted by Mack on April 29, 1998. Dr. Roberts stated: (1) Mack has had OCD since childhood; (2) he has been unable to work since December 19, 1997 due to his disorder; (3) his prognosis was "guarded to poor"; and (4) it is unknown when Mack will be able to take up some form of occupation. At the same time, Dr. Roberts completed a group long term disability form on Mack, stating that Mack is not capable of performing his occupation and that his present job could not be modified "to allow for handling with impairment."

On October 26, 1998, State Farm terminated Mack's employment due to his failure to return to work prior to exhausting all of his leave benefits.

In his Complaint, Mack alleges that he has been

discriminated against in violation of the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA").

SUMMARY JUDGMENT STANDARD

A motion for summary judgment will be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P.56©. The moving party has the responsibility of informing the Court of portions of the record or affidavits that demonstrate the absence of a triable issue. *See Celotex Corp. v. Catrett, 477* U.S. 317, 322 (1986). The moving party may meet its burden of showing an absence of material facts by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Id.* at 323. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Cain v. Lane,* 857 F.2d 1139, 1142 (7th Cir. 1988).

If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show that there is a genuine issue of material fact. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,586-87(1986). Federal Rule of Civil Procedure 56(e) requires the non-moving party to go beyond the pleadings and produce evidence of a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324. This Court must then determine whether there is a need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may be reasonably resolved in favor of either party. *See Anderson,* 477 U.S. at 250.

DISCUSSION

I. Statute of Limitations

In Illinois, an individual must file a charge with the EEOC alleging a violation of the ADEA and/or the ADA within 300 days of the alleged discriminatory act. *See Kennedy v. Chemical Waste Management, Inc., 79* F.3d 49, 50 (7th Cir. 1996) (ADA); *Unterreiner v. Volkswagen of America, Inc.,* 8 F.3d 1206, 1209 (7th Cir. 1993) (ADEA). Failure to do so bars litigation over those claims. *See* 42 U.S.C. § 2000e-5(e); *Koelsch v. Beltone Elec. Corp.,* 46 F.3d 705, 707 (7th Cir. 1995). State Farm argues that because Mack filed his ADEA and ADA charge with the EEOC on November 21, 1996, any alleged discriminatory conduct that occurred before January 26, 1996, is time-barred under § 2000e-5(e).

There is an exception to the 300-day rule, however. To overcome the untimely filing of his EEOC charge, Mack must establish that State Farm's course of conduct constituted continuing violations of the ADA and the ADEA. In *Selan v. Kiley,* 969 F.2d 560, 564 (7th Cir. 1992), the Seventh Circuit stated:

> The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitation period. For purposes of the limitations period, courts treat such a combination as one continuous act that ends with the limitation period.

The *Selan* court outlined three viable continuing violation theories in continuing violation cases. The first theory stems from "cases, usually involving hiring or promotion practices, where the employer's decision-making process takes place over a period of time, making it difficult to pinpoint the

exact day the 'violation' occurred." *Id.* at 565 (citation and internal quotation marks omitted). The second theory "stems from cases in which the employer has an express, openly espoused policy that is alleged to be discriminatory." *Id.* (citation omitted). The third theory "stems from cases in which the plaintiff charges that an employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open[ly] notorious policy..." *Id.* (citation and internal quotation marks omitted). As stated by the Seventh Circuit in another opinion, "the purpose of permitting a plaintiff to maintain a cause of action on the continuing violation theory is to permit the inclusion of acts whose character as discriminatory acts was not apparent at the time they occurred." *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 446 (7th Cir. 1994).

State Farm goes to great lengths to explain why the continuing violation doctrine does not apply in this case. It is undisputed that Mack was fully aware since July of 1986 that he was facing a lack of progress at State Farm. Not only did he then begin making inquiries and proposals in an effort to advance, he also began questioning the legality of the lack of progress afforded to him by State Farm. (Dft. SUF, ¶ ¶ 28, 29, 31). In January 1990, Mack again acknowledged and raised concerns about his lack of advancement, a theme repeated in subsequent communications by Mack to persons inside and outside of State Farm. (Dft. SUF, ¶ 34, 35, 38, 39, 41, 43, 44, 47, and 49). By 1991, Mack began writing attorneys regarding his employment rights in view of the stagnation of his career. (Dft. SUF, ¶39).

In a letter dated March 27, 1992, to an attorney, Mack stated:

> [I] am looking for a good lawyer to take my case on a consignment basis. I have stated that

> I need help because the frustration keeps mounting. . . . I lived with this frustration for many years only to find that the problem seems to be getting worse. I always felt that I could 'put up with all this' as long as I had legal recourse (an 'Ace up my sleeve').
>
> *The thing I fear most is stated in Mr. Dunn's letter. I could lose my cause of action due to the Statute of Limitations.*

(Dft. SUF, ¶ 39) (emphasis added). In July 1995, after he believed he had been denied a promotion, Mack began discussing the possibility of a lawsuit against State Farm with an attorney from the law firm representing Mack in this case.

In *Moskowitz v. Trustees of Purdue University, 5* F.3d 279 (7th Cir. 1993), the court of appeals stated:

> If it is only with the benefit of hindsight, after a series of discriminatory acts, that the plaintiff can realize that he is indeed a victim of unlawful discrimination, he can sue in regard to all of the acts provided he sues promptly after learning their character... If, however, he knows or with the exercise of reasonable diligence would have known after each act that it was discriminatory and had harmed him, he may not sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one.

Id. at 281-82. In April 1995, Mack was formally diagnosed for the first time with OCD by Dr. Paturi. In March 1996, he sought out psychological counseling for the promotion he allegedly lost the year before. Additionally, it is axiomatic that while communicating with attorneys he

knew of his own age. Simply, there is no indication in the record that Mack took any prompt action to protect his rights after being formally diagnosed with OCD and/or after turning 40-years-old.

Arguably, Mack believing that his legal rights had been violated and, therefore, seeking legal help, does not definitively establish that he knew or had reason to know that State Farm was allegedly violating his rights under the ADA and/or ADEA. However, even assuming that the evidence proffered by State Farm in its Motion for Summary Judgment fails to definitively establish that there was no continuing violation under the ADA and/or ADEA, Mack has failed to make a showing sufficient to establish the existence of a continuing violation, an element on which he would bear the burden at trial. *See De Witt v. United States, 593* F.2d 276, 281 (7th Cir. 1979) (plaintiff bears burden of proving the "benefit of an exception form the operation of a statute of limitations"); *see also Fitzpatrick v. Catholic Bishop of Chicago,* 916 F.2d 1254, 1256 (Supreme Court precedent places an affirmative burden on non-moving party at the summary judgment stage "to make a showing sufficient to establish the existence of an essential element on which he would bear the burden of proof at trial...")

In short, Mack completely fails to explain why the continuing violation doctrine applies to the facts of this case. Mack's argument concerning the statute of limitations issue is made in a single paragraph in his brief:

> With regard to Defendant's position on Statute of Limitations, the Plaintiff would assert that this argument falls far short of having any credence, especially due to the fact that Plaintiff was terminated on October 26, 1998. Prior to the date of termination, the

> Defendant always stood in a position to re-assign or accomodate [sic] the Plaintiff, an action they chose not to do.

(Plt. Mem. at 5). This undeveloped, perfunctory argument falls far short of establishing that the continuing violation doctrine should apply in this case. *See United States v. Berkowitz,* 927 F.2d 1376, 1384 (7th Cir.) ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived..."), *cert. denied,* 502 U.S. 845 (1991). Accordingly, the Court holds that the alleged discriminatory acts that took place prior to January 26, 1996, are barred pursuant to § 2000e-5(e), and Mack's conclusory argument to the contrary is rejected.

II. ADEA Claims

In its Memorandum of Law in Support of its Motion for Summary Judgment, State Farm asserts that Mack has no direct evidence tending to prove discrimination on the basis of age. Therefore, State Farm argues that to prevail Mack must rely upon the indirect burden-shifting framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), which was later adapted to age discrimination claims under the ADEA. *See McCoy v. WGN Continental Broadcasting Co.,* 957 F.2d 368, 371 (7th Cir. 1992). Mack does not dispute that he must rely upon the *McDonnell Douglas* framework to prevail under the ADEA.

To prevail under the burden-shifting framework in a case under the ADEA, Mack must initially establish a prima facie case of discrimination. To establish the prima facie case, Mack must show: (1) he was in a protected age group of 40 years old or older; (2) he was performing his job satisfactorily; (3) he suffered a materially adverse employment action; and (4) substantially younger, similarly-

situated employees were treated more favorably. *See Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 571-72 (7th Cir. 1998).

A successful prima facie showing creates a presumption of discrimination that obligates the employer to produce a legitimate non-discriminatory reason for its decision. *See Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1122 (7th Cir. 1994). Production of this legitimate non-discriminatory reason rebuts the presumption of discrimination, shifting the burden back to the employee to show that the employer's stated reasons for its action are false. *See Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 522 (7th Cir. 1994); *Denisi v. Dominick's Finer Foods, Inc.*, 99 F.3d 860, 864 (7th Cir. 1996). A plaintiff can raise a disputed issue of material fact concerning pretext by showing either that a discriminatory reason more likely motivated the employer or that the employer's explanation is unworthy of credence. *See Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1039 (7th Cir. 1993).

A. *The Denial of the July 7996 Promotion*

This Court may advance to an ultimate issue in a summary judgment analysis and consider the discrimination question notwithstanding a dispute over a fact necessary for a prima facie case. *See, e.g., Fairchild,* 147 F.3d at 572. In this case, State Farm has presented a non-discriminatory reason for not promoting Mack in July 1996 to the managerial position vacated by Lowe. In paragraph 63 of the Statement of Undisputed Facts, State Farm asserts that Reeves was awarded Lowe's former management position in Public Affairs instead of Mack because: (1) Reeves received a "performance exceeds expected" rating on his last performance review while Mack received an "expected" performance review rating; (2) Reeves had experience in

various aspects of State Farm's business to include management, claims, agency, estimating, underwriting, special disaster, and subrogation, while Mack had no claims, agency, estimating, or underwriting experience; (3) Reeves had been actively involved in several insurance organizations outside State Farm and had completed some professional insurance courses while Mack was not involved in any external organization and had not taken any professional insurance courses; (4) Reeves was actively involved and held office in many community volunteer organizations while Mack was not known to have any involvement in any such organizations; and (5) Reeves had completed approximately twice as many company-sponsored education courses. Mack has failed to proffer any evidence from which a reasonable finder of fact could conclude that State Farm's reasons for not promoting him were false. *See, e.g., Mills v. Health Care Serv. Carp.*, ___ F.3d ___, 1999 WL 144274, at *5 (7th Cir. 1999) (a plaintiff must "produce evidence from which a rational trier of fact could infer that the company lied about its proffered reasons for his dismissal"). In fact, Mack does not even attempt in his Response to address State Farm's assertion that Reeves was a better qualified candidate for the job. Accordingly, his claim that he was discriminated against because of his age when he was not promoted to Lowe's former managerial position in Public Affairs cannot survive summary judgment.

B. *The October 1998 Termination of Employment*

It is undisputed that on October 26, 1998, Mack's employment with State Farm was terminated because he failed to return to work prior to exhausting all of his leave benefits. (Dft. SUF, ¶ 100). State Farm asserts that Mack cannot meet the fourth element of the prima facie case to prove that his termination was discriminatory, *i.e.*, that a

substantially younger, similarly-situated employee was treated more favorably than Mack. *See, e.g., Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 893 (7th Cir. 1997). The Court agrees. Mack has failed to come forward with any evidence upon which a reasonable finder of fact could conclude that a substantially younger employee replaced him. *See Fitzpatrick*, 916 F.2d at 1256 (non-moving party's failure to make a showing sufficient to establish the existence of an essential element on which he would bear the burden of proof at trial requires that summary judgment be entered against non-moving party). Mack makes the assertion in his Response that "it has been admitted by the Defendant that the employee who replaced the Plaintiff was substantially younger." (Plt. Resp. at 7). First, the Court is free to disregard this alleged statement of fact since Mack is relying on alleged facts in his Response that are not part of a separate additional statement of undisputed facts. *See* CDIL-LR 7.1 (D)(3). Second, even if the Court were to disregard its local rules, Mack has failed to cite to any relevant discovery supporting this alleged fact. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (noting that "[j]udges are not like pigs, hunting for truffles buried in briefs"). Although State Farm has not affirmatively established that it, in fact, replaced Mack with someone around Mack's age, "[t]here is no requirement that the moving party negate his opponent's claim... The days are gone... when the nonmoving party could sit back and simply poke holes in the moving party's summary judgment motion." *Fitzpatrick*, 916 F.2d at 1256. Mack, not State Farm, has the affirmative duty even as the non-moving party, "to establish the existence of an essential element on which he would bear the burden of proof at trial..." *Id.* He has failed to do this.

III ADA Claims

A. *The Denial of the July 1996 Promotion*

The Seventh Circuit applies the *McDonnell Douglas* burden shifting framework to discrimination claims brought under the ADA. *See Weigel v. Target Stores,* 122 F.3d 461, 465 (7th Cir. 1997) (setting forth prima facie case for ADA case). Mack does not argue that there is direct evidence of discrimination based on his disability. Accordingly, the Court will use the shifting burden framework.

As with his ADEA claim, Mack has failed to come forward with any evidence upon which a reasonable trier of fact could find that State Farm's proffered reasons for promoting Reeves, as opposed to Mack, to Lowe's former managerial position in Public Affairs were false. Therefore, even assuming Mack could establish a prima facie case of discrimination under the ADA with regard to the denial of the promotion, his claim must fail. *See Mills,* 1999 WL 144274, at *5 ("for a plaintiff to prevail on a defendant's motion for summary judgment... he must... produce evidence from which a rationale trier of fact could infer that the company lied about its proffered reasons...").

B. *The October 1998 Termination of Employment*

The elements of a plaintiff's prima facie showing under the ADA must include a showing that the plaintiff is a member of the protected class. In the case of an ADA claim, the plaintiff must show that he is a "qualified individual with a disability." *See Weigel,* 122 F.3d at 465. The ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

State Farm maintains that as of the date of his termination Mack could not perform the essential functions of his job because he was unable to come to work. It is undisputed that on July 15, 1997, Mack was released to return to work after his first medical leave of absence without any restrictions. On December 16, 1997, Mack met with his then supervisor, Jenkins, for a performance review. Believing that the evaluation was unfair, Mack went to the Medical Department on the same day he received the evaluation. He then returned to work on December 17, 1997. On December 19, 1997, Jenkins met with Mack and criticized Mack's conduct following the December 16, 1997 review. Believing that this criticism was also unfair, Mack again went to the Medical Department rather than returning to work. Mack never again returned to work and was terminated on October 26, 1998, due to his failure to return to work prior to exhausting all of his leave benefits.

Federal courts have regularly held that an employee who cannot meet the attendance requirements of the job at issue cannot be considered a qualified individual protected by the ADA. *See Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir. 1994); *Corder v. Lucent Technologies, Inc.*, 162 F.3d 924, 928 (7th Cir. 1998); *Jackson v. Veterans Admin.*, 22 F.3d 277, 278-79 (11th Cir. 1994) (a plaintiff "must be willing and able to demonstrate [those] skills by coming to work on a regular basis"); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994) ("coming to work regularly" is an "essential function"). In light of the undisputed fact that Mack did not go to work at State Farm for approximately 10 months, he cannot seriously argue that he could perform the essential functions of his job.

Mack, however, argues:

How can it be that STATE FARM'S own

> medical department has refused to release the Plaintiff to return to work and then the Defendant, STATE FARM, terminates the Plaintiff because he has exhausted his leave benefits?

(Plt. Resp. at 6). Noticeably absent from Mack's Response, however, is any assertion supported by the evidence in the record that he was ever able to return to work after he left on December 19, 1997. In fact, the medical evidence in this case clearly indicates otherwise. Dr. Ratner concluded after examining Mack that: (1) Mack's paranoia and obsessionalism have combined to "poison the well" of his employment at State Farm; and (2) State Farm is uniquely a place where Mack will not be able to return to work. (Dft. SUF, ¶ 89). During his deposition, he was asked whether he could return to work at state farm. Mack replied:

> Well, I think that's the whole reason why I've applied for LTD, long-term disability, because I have come to the realization that, yes, I don't feel like I can [return to State Farm] because when I go in there I'm looking out the eyes in the back of my head.

(Mack Dep. at 111). In April 1998, Mack represented in a total disability claim form that he could not return to work because returning to work would place him "in a life threatening position [of] dealing with the extreme hostile work environment." (Dft. SUF, ¶ 86). The Seventh Circuit has stated that when employees represent to employers that they are totally disabled, "employers and factfinders are entitled to take them at their word." *Weigel,* 122 F.3d at 467. Therefore, State Farm was entitled to take Mack at his word when he represented by filling out the total disability form that he was unable to return to work.

Of course, the Court is aware that § 12111(8) of the ADA defines "qualified individual with a disability" as someone who "with or without reasonable accommodation" can perform the essential functions of the employment position held or desired by the plaintiff. Therefore, the Court will analyze whether State Farm failed to reasonably accommodate Mack's OCD. Whether the Court really needs to undertake such an inquiry is questionable in light of Mack's representation that he is totally disabled. Nevertheless, because the "reasonable" accommodations sought by Mack are patently without merit, the Court concludes that State Farm did not fail to reasonably accommodate Mack's OCD.

When asked by State Farm during his deposition how State Farm might accommodate him, Mack replied that he wanted "a guarantee to be left alone." (Dft. SUF, ¶ 88). Additionally, in May 1996, Mack had a discussion with Lowe in which he indicated that he "desperately needed to be promoted" to bring the "closure needed for [his] COMPULSION to be recognized for [his] achievements." (Dft. SUF, ¶ 57). As a matter of law, an employer does not have to accommodate an employee by promoting him to a higher position. *See Malabarba v. Chicago Tribune Co.,* 149 F.3d 690, 699 (7th Cir. 1998). Furthermore, the Court has little trouble in concluding that the request to be "left alone" need not be an accommodation that State Farm must offer. First, it is not clear what it means to be "left alone" in the work place, and it appears from Mack's deposition testimony and Response to the Motion for Summary Judgment that he is unable to articulate what this means, as well. Second, the Court is hard pressed to think of any job that is without contact with supervisors and Co-employees. Therefore, in light of the fact that Mack has not articulated what it means to be "left alone" and because any job will necessarily entail

some interaction with co-employees and supervisors, Mack's request to be left alone is not a reasonable request under the ADA.

Mack also points to a letter attached as Exhibit A to his Response that he received from State Farm in April 1998 during his second and final medical leave of absence as evidence of State Farm's refusal to reasonably accommodate his OCD. The Court first notes that it does not even have to address this letter, as Mack has failed to comply with Local Rule 7.1 (D)(3). Nevertheless, consideration of the letter fails to establish a genuine issue of material fact. In the letter, State Farm denied Mack's request to be moved from his current position in Public Affairs to a different department. *(See* Resp., Ex. A). While the Seventh Circuit has stated that the term "reasonable accommodation" may include reassignment to a *"vacant* position," the employer is not obliged to "bump another employee, and the plaintiff has the burden of showing that the vacant position exists and that he is qualified for this position *McCreary v. Libbey-Owens-Ford Co.,* 132 F.3d 1159, 1165 (7th Cir. 1997) (emphasis added); *see also* 42 U.S.C. § 12111(9). Mack has failed to proffer any evidence from which a reasonable trier of fact could conclude that he has met his burden. Accordingly, the letter attached as Exhibit A to his Response fails to demonstrate the existence of a genuine issue of material fact.

C. *Hostile Work Environment*

It is not clear whether a hostile work environment claim exists under the ADA. *See Erjavac v. Holy Family Health Plus,* 13 F. Supp. 2d 737, 751 (N.D. 111.1998). State Farm argues that even assuming such a claim exists, Mack has not alleged and cannot establish that he has been subjected to adverse treatment because of his disability which was sufficiently severe or pervasive that a reasonable

person would find it hostile. *See Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 885 (7th Cir. 1998).

In his Complaint Mack does not use the term "hostile work environment," which leads the Court to question whether, in fact, he is asserting such a claim. Nevertheless, because State Farm has argued in its Motion for Summary Judgment that there was not a hostile work environment and Mack has failed to argue otherwise in his Response, he has waived this claim to the extent he was even making it. *Cf. Berkowitz*, 927 F.2d at 1384 ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived...")

IV. Other Adverse Employment Actions

State Farm argues in its Motion for Summary Judgment that for purposes of the ADA, Mack's denial of promotion in July 1996, his termination of employment in October 1998, and his claim that State Farm failed to reasonably accommodate him are the only adverse employment actions that rise to the level of materiality required by the ADA. With disposal of Mack's claims relating to the 1996 promotion denial, the 1998 termination of employment, and reasonable accommodation, State Farm contends that Mack is otherwise left without a cause of action under the ADA. Similarly, State Farm argues that the promotion denial and the termination of employment are the only adverse actions that rise to the level of materiality required by the ADEA. According to State Farm, the record is otherwise void of any materially adverse employment actions for purposes of the ADEA. Mack presumably agrees with State Farm's assertions, as he has not argued otherwise in his Response. Accordingly, the Court finds that the conclusions reached in this Order regarding the

aforementioned issues dispose of the entire case.

CONCLUSION

For the foregoing reasons, State Farm's Motion for Summary Judgment [#48] is GRANTED. This case is TERMINATED.

ENTERED this 15th day of April, 1999.

s/ Michael M: Mihm
Michael M: Mihm
United States District Judge

APPENDIX – C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 14, 2000

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

TIMOTHY L. MACK Plaintiff-Appellant,	]	Appeal from the United States District Court for the
No. 99-2315 v.	]	Central District of Illinois,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	]	Peoria Division. No.97 C 1207 Michael M. Mihm, Judge.

ORDER

Upon consideration of the **PLAINTIFF/APPELLANT'S MOTION TO RECONSIDER,** which the court construes as a motion for rehearing, filed on Feb. 4, 2000, by the pro se appellant,

IT IS ORDERED that the Petition for Rehearing is **DENIED.**

APPENDIX – D

EEOC NOTICE, Number 915.002, Date 3-25-97

Enforcement Guidance: The Americans With Disabilities Act and Psychiatric Disabilities

INTRODUCTION

The workforce includes many individuals with psychiatric disabilities who face employment discrimination because their disabilities are stigmatized or misunderstood. Congress intended Title I of the Americans with Disabilities Act (ADA)1 to combat such employment discrimination as well as the myths, fears, and stereotypes upon which it is based.2

The Equal Employment Opportunity Commission ("EEOC" or "Commission") receives a large number of charges under the ADA alleging employment discrimination based on psychiatric disability.3 These charges raise a wide array of legal issues including, for example, whether an individual has a psychiatric disability as defined by the ADA and whether an employer may ask about an individual's psychiatric disability. People with psychiatric disabilities and employers also have posed numerous questions to the EEOC about this topic.

This guidance is designed to: facilitate the full enforcement of the ADA with respect to individuals alleging employment discrimination based on psychiatric disability; respond to questions and concerns expressed by individuals with psychiatric disabilities regarding the ADA; and answer questions posed by employers about how principles of ADA analysis apply in the context of psychiatric disabilities.4

WHAT IS A PSYCHIATRIC DISABILITY UNDER THE ADA?

Under the ADA, the term "disability" means: "(a) A physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment."5

This guidance focuses on the first prong of the ADA's definition of "disability" because of the great number of questions about how it is applied in the context of psychiatric conditions.

Impairment

1. What is a "mental impairment" under the ADA?

The ADA rule defines "mental impairment" to include "[a]ny mental or psychological disorder, such as . . . emotional or mental illness."6 Examples of "emotional or mental illness[es]" include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders.The current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (now the fourth edition, DSM-IV) is relevant for identifying these disorders. The DSM-IV has been recognized as an important reference by courts7 and is widely used by American mental health professionals for diagnostic and insurance reimbursement purposes. Not all conditions listed in the DSM-IV, however, are disabilities, or even impairments, for purposes of the ADA. For example, the DSM-IV lists several conditions that Congress expressly excluded from the ADA's

definition of "disability."8 While DSM-IV covers conditions involving drug abuse, the ADA provides that the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of that use.9 The DSM-IV also includes conditions that are not mental disorders but for which people may seek treatment (for example, problems with a spouse or child).10 Because these conditions are not disorders, they are not impairments under the ADA.11 Even if a condition is an impairment, it is not automatically a "disability." To rise to the level of a "disability," an impairment must "substantially limit" one or more major life activities of the individual.12

2. Are traits or behaviors in themselves mental impairments?

No. Traits or behaviors are not, in themselves, mental impairments. For example, stress, in itself, is not automatically a mental impairment. Stress, however, may be shown to be related to a mental or physical impairment. Similarly, traits like irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments, although they may be linked to mental impairments.13

Major Life Activities

An impairment must substantially limit one or more major life activities to rise to the level of a "disability" under the ADA.14

3. What major life activities are limited by mental impairments?

The major life activities limited by mental impairments differ from person to person. There is no exhaustive list of

major life activities. For some people, mental impairments restrict major life activities such as learning, thinking, concentrating, interacting with others,15 caring for oneself, speaking, performing manual tasks, or working. Sleeping is also a major life activity that may be limited by mental impairments.16

4. To establish a psychiatric disability, must an individual always show that s/he is substantially limited in working?

No. The first question is whether an individual is substantially limited in a major life activity other than working (e.g., sleeping, concentrating, caring for oneself). Working should be analyzed only if no other major life activity is substantially limited by an impairment.17

Substantial Limitation

Under the ADA, an impairment rises to the level of a disability if it substantially limits a major life activity.18 "Substantial limitation" is evaluated in terms of the severity of the limitation and the length of time it restricts a major life activity.19The determination that a particular individual has a substantially limiting impairment should be based on information about how the impairment affects that individual and not on generalizations about the condition. Relevant evidence for EEOC investigators includes descriptions of an individual's typical level of functioning at home, at work, and in other settings, as well as evidence showing that the individual's functional limitations are linked to his/her impairment. Expert testimony about substantial limitation is not necessarily required. Credible testimony from the individual with a disability and his/her family members, friends, or coworkers may suffice.

5. When is an impairment sufficiently severe to substantially limit a major life activity?

An impairment is sufficiently severe to substantially limit a major life activity if it prevents an individual from performing a major life activity or significantly restricts the condition, manner, or duration under which an individual can perform a major life activity, as compared to the average person in the general population.20 An impairment does not significantly restrict major life activities if it results in only mild limitations.

6. Should the corrective effects of medications be considered when deciding if an impairment is so severe that it substantially limits a major life activity?

No. The ADA legislative history unequivocally states that the extent to which an impairment limits performance of a major life activity is assessed without regard to mitigating measures, including medications.21 Thus, an individual who is taking medication for a mental impairment has an ADA disability if there is evidence that the mental impairment, when left untreated, substantially limits a major life activity.22 Relevant evidence for EEOC investigators includes, for example, a description of how an individual's condition changed when s/he went off medication 23 or needed to have dosages adjusted, or a description of his/her condition before starting medication.24

7. How long does a mental impairment have to last to be substantially limiting?

An impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that

time. It is not substantially limiting if it lasts for only a brief time or does not significantly restrict an individual's ability to perform a major life activity.25 Whether the impairment is substantially limiting is assessed without regard to mitigating measures such as medication.

Example A: An employee has had major depression for almost a year. He has been intensely sad and socially withdrawn (except for going to work), has developed serious insomnia, and has had severe problems concentrating. This employee has an impairment (major depression) that significantly restricts his ability to interact with others, sleep, and concentrate. The effects of this impairment are severe and have lasted long enough to be substantially limiting.

In addition, some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities.26

Example B: An employee has taken medication for bipolar disorder for a few months. For some time before starting medication, he experienced increasingly severe and frequent cycles of depression and mania; at times, he became extremely withdrawn socially or had difficulty caring for himself. His symptoms have abated with medication, but his doctor says that the duration and course of his bipolar disorder is indefinite, although it is potentially long-term. This employee's impairment (bipolar disorder) significantly restricts his major life activities of interacting with others and caring for himself, when considered without medication. The effects of his impairment are severe, and their duration is indefinite and potentially long-term. However, conditions that are temporary and have no permanent or long-term effects on an individual's major life activities are not

substantially limiting.

Example C: An employee was distressed by the end of a romantic relationship. Although he continued his daily routine, he sometimes became agitated at work. He was most distressed for about a month during and immediately after the breakup. He sought counseling and his mood improved within weeks. His counselor gave him a diagnosis of "adjustment disorder" and stated that he was not expected to experience any long-term problems associated with this event. While he has an impairment (adjustment disorder), his impairment was short-term, did not significantly restrict major life activities during that time, and was not expected to have permanent or long-term effects. This employee does not have a disability for purposes of the ADA.

8. Can chronic, episodic disorders be substantially limiting?

Yes. Chronic, episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms. For some individuals, psychiatric impairments such as bipolar disorder, major depression, and schizophrenia may remit and intensify, sometimes repeatedly, over the course of several months or several years.27

9. When does an impairment substantially limit an individual's ability to interact with others?

An impairment substantially limits an individual's ability to interact with others if, due to the impairment, s/he is significantly restricted as compared to the average person in the general population. Some unfriendliness with coworkers or a supervisor would not, standing alone, be sufficient to

establish a substantial limitation in interacting with others. An individual would be substantially limited, however, if his/her relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary. These limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.

Example: An individual diagnosed with schizophrenia now works successfully as a computer programmer for a large company. Before finding an effective medication, however, he stayed in his room at home for several months, usually refusing to talk to family and close friends. After finding an effective medication, he was able to return to school, graduate, and start his career. This individual has a mental impairment, schizophrenia, which substantially limits his ability to interact with others when evaluated without medication. Accordingly, he is an individual with a disability as defined by the ADA.

10. When does an impairment substantially limit an individual's ability to concentrate?

An impairment substantially limits an individual's ability to concentrate if, due to the impairment, s/he is significantly restricted as compared to the average person in the general population.28 For example, an individual would be substantially limited if s/he was easily and frequently distracted, meaning that his/her attention was frequently drawn to irrelevant sights or sounds or to intrusive thoughts; or if s/he experienced his/her "mind going blank" on a frequent basis. Such limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.29

Example A: An employee who has an anxiety disorder says that his mind wanders frequently and that he is often distracted by irrelevant thoughts. As a result, he makes repeated errors at work on detailed or complex tasks, even after being reprimanded. His doctor says that the errors are caused by his anxiety disorder and may last indefinitely. This individual has a disability because, as a result of an anxiety disorder, his ability to concentrate is significantly restricted as compared to the average person in the general population.

Example B: An employee states that he has trouble concentrating when he is tired or during long meetings. He attributes this to his chronic depression. Although his ability to concentrate may be slightly limited due to depression (a mental impairment), it is not significantly restricted as compared to the average person in the general population. Many people in the general population have difficulty concentrating when they are tired or during long meetings.

* * * * * * * * * * * * *

DISCLOSURE OF DISABILITY

Individuals with psychiatric disabilities may have questions about whether and when they must disclose their disability to their employer under the ADA. They may have concerns about the potential negative consequences of disclosing a psychiatric disability in the workplace, and about the confidentiality of information that they do disclose.

* * * * * * * * * * * * *

REQUESTING REASONABLE ACCOMMODATION

An employer must provide a reasonable accommodation to

the known physical or mental limitations of a qualified individual with a disability unless it can show that the accommodation would impose an undue hardship.45 An employee's decision about requesting reasonable accommodation may be influenced by his/her concerns about the potential negative consequences of disclosing a psychiatric disability at work. Employees and employers alike have posed numerous questions about what constitutes a request for reasonable accommodation. 17. When an individual decides to request reasonable accommodation, what must s/he say to make the request and start the reasonable accommodation process?

When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "'reasonable accommodation."46

Example A: An employee asks for time off because he is "depressed and stressed." The employee has communicated a request for a change at work (time off) for a reason related to a medical condition (being "depressed and stressed" may be "plain English" for a medical condition). This statement is sufficient to put the employer on notice that the employee is requesting reasonable accommodation. However, if the employee's need for accommodation is not obvious, the employer may ask for reasonable documentation concerning the employee's disability and functional limitations.47

* * * * * * * * * * * * *

19. Do requests for reasonable accommodation need to be in

writing?

No. Requests for reasonable accommodation do not need to be in writing. Employees may request accommodations in conversation or may use any other mode of communication.50

20. When should an individual with a disability request a reasonable accommodation to do the job?

An individual with a disability is not required to request a reasonable accommodation at the beginning of employment. S/he may request a reasonable accommodation at any time during employment.51

21. May an employer ask an employee for documentation when the employee requests reasonable accommodation for the job?

Yes. When the need for accommodation is not obvious, an employer may ask an employee for reasonable documentation about his/her disability and functional limitations. The employer is entitled to know that the employee has a covered disability for which s/he needs a reasonable accommodation.52 A variety of health professionals may provide such documentation with regard to psychiatric disabilities.53

22. May an employer require an employee to go to a health care professional of the employer's (rather than the employee's) choice for purposes of documenting need for accommodation and disability?

The ADA does not prevent an employer from requiring an employee to go to an appropriate health professional of the

employer's choice if the employee initially provides insufficient information to substantiate that s/he has an ADA disability and needs a reasonable accommodation. Of course, any examination must be job-related and consistent with business necessity.55 If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).

* * * * * * * * * * * * *

26. Is adjusting supervisory methods a form of reasonable accommodation?

Yes. Supervisors play a central role in achieving effective reasonable accommodations for their employees. In some circumstances, supervisors may be able to adjust their methods as a reasonable accommodation by, for example, communicating assignments, instructions, or training by the medium that is most effective for a particular individual (e.g., in writing, in conversation, or by electronic mail). Supervisors also may provide or arrange additional training or modified training materials. Adjusting the level of supervision or structure sometimes may enable an otherwise qualified individual with a disability to perform essential job functions. For example, an otherwise qualified individual with a disability who experiences limitations in concentration may request more detailed day-to-day guidance, feedback, or structure in order to perform his job.62

Example: An employee requests more daily guidance and feedback as a reasonable accommodation for limitations associated with a psychiatric disability. In response to his request, the employer consults with the employee, his health care professional, and his supervisor about how his

limitations are manifested in the office (the employee is unable to stay focused on the steps necessary to complete large projects) and how to make effective and practical changes to provide the structure he needs. As a result of these consultations, the supervisor and employee work out a long-term plan to initiate weekly meetings to review the status of large projects and identify which steps need to be taken next.

* * * * * * * * * * * * *

29. When is reassignment to a different position required as a reasonable accommodation?

In general, reassignment must be considered as a reasonable accommodation when accommodation in the present job would cause undue hardship64 or would not be possible.65 Reassignment may be considered if there are circumstances under which both the employer and employee voluntarily agree that it is preferable to accommodation in the present position.66 Reassignment should be made to an equivalent position that is vacant or will become vacant within a reasonable amount of time. If an equivalent position is not available, the employer must look for a vacant position at a lower level for which the employee is qualified. Reassignment is not required if a vacant position at a lower level is also unavailable.

APPENDIX – E

State Farm Insurance Companies (Letterhead)

April 7, 1998

Tim Mack
2817 Arrowhead Drive
Bloomington, IL 61704

Dear Tim:

As you will recall, you requested an accommodation under the ADA during one of our recent discussions. In particular, you asked to be moved from your current position in the Public Affairs Department to a position in a different department at State Farm. In accordance with our policies, your request for accommodation was forwarded to the ADA Accommodation Request Review Committee ("Committee") for review.

In order to be entitled to reasonable accommodation under the ADA, you must be substantially limited in your ability to perform one or more major life activities. To be substantially limited, you must be unable to perform or significantly limited in your ability to perform one or more major life activities as compared to the general population.

The Committee considered the information available from you and your physician(s). After reviewing this information, the Committee concluded that while you may possess some limitations, you are not substantially limited in any major life activity, including the activity of working. Consequently, you are not entitled to receive and State Farm is not required to provide reasonable accommodation under the ADA.

If you should like to submit additional information for the Committee's consideration, please feel tree to send it directly

to me. Otherwise, based upon the Committee's findings, management has determined that your request for a transfer under the ADA is denied.

If you have any questions, please let me know.

Sincerely,

s/ Deb Dresslar
Deb Dresslar

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